Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

JOHN WILSON,

Petitioner,

v.

THE STATE OF WASHINGTON;
DARRELL HAMILTON, M.D.; KATY WILLIAMS;
DAVID WATSON; and JOHN REYNOLDS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Washington State Court of Appeals, Division II

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38 pp

QUESTIONS PRESENTED

Whether the Supreme Court will examine and clarify the substantial amount of conflicting case law generated by the various circuit courts and reflected in the state appellate court opinion herein, relating to the First Amendment rights of public employees to speak out on issues of public concern?

Whether the first element of a public employee's free speech claim - whether the speech involves "a matter of public concern" - must always be treated as a question of law for the court to decide or, whether under appropriate circumstances, it may be treated as a question of fact subject to resolution by a jury?

Whether an appellate court, in reviewing a jury verdict in favor of a public employee on a violation of free speech claim, has the authority, under the guise of applying the *Pickering* balancing test, to manufacture justifications for suppression of speech and find speech unprotected based on such justifications, when the manufactured justifications were neither articulated nor relied upon by the public employer when it made the allegedly unlawfully retaliatory adverse employment decisions?

Whether a court should even examine the *Pickering*

balance element of a public employee's First Amendment free speech claim when the public employer has denied that the exercise of free speech played a role in the adverse employment decision?

Whether the State Appellate Court decision at issue herein placed unwarranted and undue emphasis on the private and work related nature of the petitioner's exercise of free speech in determining the speech was unprotected when the precedent of this court and the circuit courts indicated that neither consideration is dispositive when determining if a public employee's speech is worthy of protection?

Does a public employee, in a First Amendment case, have to show, in order to defeat a claim of qualified immunity, that prior case law has a substantial correspondance to the fact pattern at issue, or is it sufficient that the law simply be so clearly established that a public official is on notice that his actions could be unlawful?

Petitioner, John R. Wilson, respectfully prays that a certiorari issued to the judgment and opinions of the Washington State Court of Appeals, Division II.

OPINION BELOW

The decision of the Court of Appeals as amended is reported at 84 Wn.App. 332, ___ P.2d ____ (1996) and reproduced at Appendix A. Additionally, a notation of the denial of the petition for review to the Washington Supreme Court is located at 131 Wn.2d 1022, ___ P.2d ___ (1997) and is reproduced at Appendix B.

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STATEMENT OF JURISDICTION

The decision of the Washington State Court of Appeals was filed initially on August 29, 1996. A motion for reconsideration was filed. On December 20, 1996, an order was issued denying reconsideration but modifying and re-issuing the opinion with minor, non-material changes.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257 (constitutional question) and 28 U.S.C. 2101(c). This petition is timely under the terms of Supreme Court Rule 13(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution and 42 U.S.C. § 1983, the pertinent text of which are set forth in Appendix C.

STATEMENT OF THE CASE

A. Factual Background

For the mentally ill, often the only hope is a pharmacological solution. Petitioner John "Jack" Wilson was the former director of Western State Hospital pharmacy (hereafter WSH). In 1985, after being heavily

recruited by defendant Darrell Hamilton he reluctantly assumed the position. On his arrival, the place was in disarray and it was understood that it was in need of a long-term administrative overhaul. (RP 161-77, 189-267). It was such a disaster that the WSH's pharmacy failed a Medicare survey and $40 million in funding was in jeopardy.

Heroically, Dr. Wilson was quickly able to get organized and passed another survey a few months later. (RP 270). The ensuing years were marked with astounding success. Staff grew from eight to twenty-nine. By 1988, the pharmacy was recognized as one of the 50 best hospital pharmacies in the country. (RP 21-24, Ex. 1).

Dr. Wilson and his management team, trying to keep WSH in conformance with the best of national standards and progressive organizational ideas, began developing an internal credentialling system that allowed pharmacists with demonstrated abilities to move from dispensing tasks to "clinical work", i.e., actually consulting with the doctors and patients as part of the treatment team. (RP 860-61). This system was non-elitist and allowed bachelor-degree pharmacists to participate in clinical work along with those with doctorates (who qualified).

Defendant Williams, a Ph.D., objected to this system and elitistly told others "if you want to do clinical work, you should go back to school." As time progressed, the scope of Williams' disgruntlement widely multiplied and set into motion a bizarre set of events with twists and turns that, within a relatively short period of time, resulted in Jack Wilson, the savior of the WSH pharmacy department, being "rubber roomed".[4] Rubber room, i.e. being stripped of his duties, assigned to do demeaning simple tasks, assigned to a desk in a dim hallway without a phone or in a file room with a basement window well where the patients would often urinate. (RP 521-35).

On September 9, 1989, Wilson received an exceptional evaluation. (Ex. 5).

His demise commenced on October 23, 1989 when the paragematic disgruntled self-interested employee Katy Williams wrote a memo to him with a copy to Hamilton complaining of unequal dispensing time. (Ex. 43).[5] While Dr. Wilson was on vacation, Hamilton and Williams met

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[4]Not surprisingly, Dr. Williams did not score as well as some of the bachelor-degree pharmacists in some of the earlier credentialling tests. (RP 103).

[5]In this memo, no mention was made that Williams somehow believed she was a victim of gender discrimination.

behind Dr. Wilson's back. (RP 324, 677).

On approximately November 28, 1989, Dr. Wilson returns from vacation/Thanksgiving, and was confronted with Hamilton telling him he has discussed the memo with Katy, has determined that her complaint constitutes gender discrimination; that he will support her; and orders Dr. Wilson to "equalize dispensing time." In fact, there were two male Pharm.D's, one who did more dispensing and one who did less than Katy. (RP 327).

Thereafter, there were numerous discussions and memos between Hamilton, Dr. Wilson and Williams, and meetings with Dr. Wilson and his management team. Dr. Wilson explained to Hamilton that if he gave Williams such a remedy when no discrimination occurred, it would "pull the tent pole" from under the organization. The credentialling and a job-description package, which involved large taxpayer investments, would be in jeopardy. He would be forced to adjust each employee's tasks to the minute whenever they complained of unequal allocation of job tasks, thus detracting from the mission of the agency. (RP 328-331).

On January 3, 1990, Dr. Wilson submitted the "white paper" to Hamilton, stating concerns about the potential adverse effects the Williams matter could have on

the efficiency of the mission of the pharmacy (Ex. 9).

> Any decision involving special task assignment of Dr. Williams or any pharmacy staff must be consistent with the pharmacy department's fundamental 1985 competency-based philosophy. To now abandon a competency-based philosophy for a degree-based philosophy would have severe repercussions since it would:
>
> a. be contrary to local and national standards;
>
> b. be contrary to competency-based 1989 WSH by-laws;
>
> c. demonstrate inconsistency on the part of management which has emphasized and established competency as the single most important criteria for special task assignment;
>
> d. lead to potential resignations and/or grievances from several B.S. staff who are already on record as opposing any such inconsistencies as subjective, unfair partiality/favoritism, elitist and grounds for discrimination; and
>
> e. Require the department to expeditiously develop a new philosophy in its place and modify or abolish numerous other procedures/practices since the current philosophy is pervasive throughout the department's operations.

Hamilton wrote a memo to Dr. Wilson ordering him to collect data on how clinical pharmacists spent time. (RP 428-9).

Dr. Wilson received another memo from Hamilton (dated January 12), ordering action by the 19th, saying he should cease gathering the data because Hamilton has made up his mind. He also ordered Dr. Wilson to discontinue "other time study logs - they are counterproductive." (RP 429-30, Exhibit 10). (This document showed up later as the sole document in support for a 51-point grievance submitted by 11 technicians.)

Dr. Wilson called Hamilton and told him he would comply with his order to equalize dispensing time among all Pharm.D's, but would resign the next day. He requested a courtesy meeting with hospital superintendent (and defendant) John Reynolds. (RP 432-33). At the meeting, Reynolds sided with Dr. Wilson. Hamilton was furious. (RP 434). A second meeting, or "hearing," was held. Reynolds again upheld Dr. Wilson. (RP 435-6).

Dr. Wilson was presented with a "pre-settlement agreement" based on an Office of Equal Opportunity investigation which had been going on without his knowledge in the ensuing months. As determined by the document trail in discovery, Reynolds had no sooner taken Dr. Wilson's side in January, than he had forwarded the information to the OEO taking the opposite side. (RPs 437-448, 1186-7).

On May 4, 1990, eleven of the fourteen technicians signed a 50-plus-point "grievance" accusing Dr. Wilson of dishonesty, violation of laws, regulations and policies, and so forth, to the extent that if they had been true, Dr. Wilson would have had his pharmacist credentials rejected and probably been sentenced to prison. (RP 337-8). Dr. Wilson was not allowed, informally or formally, to inquire as to details of the allegations. (RP 339).

At trial, substantial circumstantial evidence was presented to show that Williams fomented and was a motivating force behind the grievance. (RP 463, 698-9, 906, 790, 800-01).

In June of 1990, the Medicare survey team, with the same pharmacist evaluator who had failed the pharmacy in 1985, passed the pharmacy with flying colors. The evaluator told the pharmacists at a meeting that they were doing some of the finest work he had ever seen. (RP 479-481).

The next day, a day after the Medicare survey team left, Hamilton called Dr. Wilson in and "temporarily" relieved him. He told Dr. Wilson he would run the pharmacy himself, and would talk to Dr. Wilson every day. In fact, he did not talk to Dr. Wilson at all.

(RP 480-481, 912).

On July 3, 1990, Hamilton named Williams as head of the pharmacy. (Exhibit 81, RP 913). Thereafter, Dr. Wilson took several months off, suffering severe emotional distress.

In September, (a father of six) Dr. Wilson went back to work, and Williams placed him at a desk next to the receptionist, without a phone, doing full-time dispensing. RP 501. Williams played, or allowed others to play, the song "Hit the Road, Dr. Wilson," over the pharmacy public address system on many occasions. (RP 706). Defendant David Watson became his supervisor, and treated Dr. Wilson in a humiliating and demeaning manner. (RP 502). He would formally discipline Dr. Wilson, for example, for "improper" use of the fax machine for sending some pharmacy-related information to an attorney, while Watson himself used the fax machine to send and receive obscene cartoons. (RP 504-5, Exhibit 23).

Watson secretly recorded private conversations between he and Dr. Wilson. Such recording was (and is) violative of state law. Watson contended that the recordings would exonerate him, but did not produce the tapes. (RP 879-81). Hamilton told the superintendent

in an October 9 memo, Exhibit 25, that he had instructed Watson to return the tapes (plural) to Dr. Wilson. However, in a handwritten note at the bottom of an October 18 memo, Hamilton wrote, "Watson, destroy those tapes." (Exhibit 26, RP 510).

Williams approved two persons attending the Washington State Hospital Pharmacist Association meeting at state expense, but denied Dr. Wilson's similar request, even though he was the president. (RP 511-512).

Watson stole a computer disk belonging to Dr. Wilson and lied about it. When Dr. Wilson discovered it and complained, he (Dr. Wilson) was removed from the Pharmacy and sent to work for Dr. Ira Klein. They took his key to the pharmacy away, and his manual for drug use control. (RP 512-514). That took away his access to the library, and interfered with his ability to function as a professional. (RP 521-522, 525-6).

After several months of working for Dr. Klein, Dr. Wilson was returned to Hamilton's supervision. Hamilton ordered him out of his modern office, and assigned him to a desk in a smelly basement corridor with dim lighting, and no phone. He removed Dr. Wilson's computer. (RP 530). Dr. Wilson was assigned to work

that could have been done by a technician. (RP 528-9, Exhibit 29). In the five years since, no management person ever asked him for any suggestion as to how he could make a better contribution to patient care with his high level of training and expertise. (RP 1199).

He was forbidden from consulting with his professional colleagues. (RP 536).

After about five months in the hallway, he was transferred to a file room with a basement window in a well where patients often urinated -- even more unpleasant than the hallway. (RP 534-35).

Several years later, Dr. Wilson was asked to perform consultations on the wards, still without access to literature, still without collegial discourse. (RP 537-8). That caused him to choose between embarrassment at not being current, or making recommendations that might harm a patient. (RP 537-8).

Dr. Wilson thereafter received wildly false employee evaluations and was repeatedly accused of wrongdoing and subjected to "kangaroo courts" and false and unfounded allegations of wrongdoing. (RP 97, 341-62, 465-76, 545-6, 829, 1152, 1156).

B. Procedural History

On or about June 10, 1992, Jack Wilson, as

Plaintiff, filed a Complaint for Damages in the Pierce County, Washington Superior Court (Cause No. 92-2-05810-9) alleging several claims including a 42 USC § 1983 claim that he had been subject to retaliatory adverse employment decisions in reprisal for exercising his right to free speech under the First Amendment to the federal constitution. (CP 4-7).

On April 28, 1995, the Honorable Brian Tollefson heard defendants' motion for summary judgment. Judge Tollefson, among other things, dismissed plaintiff's First Amendment claim but allowed the case to proceed to trial on claims of outrage, defamation and civil conspiracy.

The case was called for trial on May 3, 1995. The first matter considered was plaintiff's motion for reconsideration of the dismissal of petitioner's First Amendment claim. (RP Vol. I). After extensive argument, Judge Tollefson granted the motion for reconsideration, and reinstated the First Amendment and a conspiracy to violate federal rights claims. (RP I p. 39).

Plaintiff put on his case in chief. It lasted several days. On May 12, 1995, plaintiff rested his case in chief and defendants moved to dismiss all claims. (RP 8, p. 1029).

After hearing argument, Judge Tollefson reserved ruling on plaintiff's First Amendment claim. (RP 8, p. 1055). He dismissed the outrage claim due to insufficient evidence and the defamation claim on statute of limitations grounds. (Id., p. 1052-54). However, he viewed defamation as being one of the unlawful acts that still could be considered as evidence on plaintiff's conspiracy claim. (Id., p. 1054).

Ultimately, Judge Tollefson ruled as a matter of law that plaintiff had satisfied the public concern and balancing elements of a public employee's First Amendment claim. (RP 9, p. 1063-67).

Thereafter, the defendants went on to put on their own case-in-chief. (RP 9, p. 1075-1150). Plaintiff then put on a short rebuttal case. (RP 9, p. 1150-1221). The defendants did not move for a directed verdict at the close of the evidence, nor did they renew their motion to dismiss at the close of the evidence. (RP 9, p. 1074).

On May 17, 1995, exceptions were taken to the Court's Instructions (RP 10, p. 1232-1248).

Significantly, Court's Instruction Nos. 7 and 8 were crafted by the Court after its informal meeting with counsel. The court's instructions on the First

Amendment claim were essentially a shortened version of Defendants' Proposed Instruction which also gave the public concern and balancing elements to the jury. Petitioner, not the defendants took exception to this instruction.

On May 18, 1995, the jury returned a verdict of $9,000,000.00 in favor of Jack Wilson. (CP 466-69).

After failed attempts at post-trial relief, defendants appealed. The Court of Appeals reversed the judgment as set forth in Appendix A. Petitioner sought reconsideration. The motion for reconsideration was denied, but the opinion was amended to reflect correction of factual error and re-filed on December 20, 1996.

Petitioner filed a timely petition for review to the Washington State Supreme Court. On May 6, 1997, without comment, the Washington State Supreme Court declined review.

REASONS FOR GRANTING THE WRIT

The decision of the Washington State Court of Appeals conflicts with the precedent of the United States Supreme Court, the Federal Circuit Courts and the Washington Appellate Court's own First

Amendment Related Cases. Further, the instant matter provides the Supreme Court the opportunity to address and define the appropriate methods, manners and procedures to be utilized on a public employee's claim that his First Amendment rights have been violated by adverse employment actions taken in retaliation for engaging in speech on a matter of public concern and the availability of qualified immunity on such a claim.

A. Public Concern.

In the instant matter, the respondents repeatedly denied that they engaged in adverse employment actions in response to petitioner's exercise of free speech but a jury found otherwise. Yet, the state appellate court found "on balance" the employer's interest outweighed the employee's despite the fact that, at trial, the government never raised such interest as a justification for its actions. In other words, under the guise of deciding a question of law through pure fiat, the state appellate court not only substituted its judgment for that of the jury but also gave the public employer the benefit of a decision it never made. It is submitted such actions are at odds with clearly defined precedent and set a dangerous precedent that will abrade public employees' abilities to speak out on issues

of public concern.

> Silencing a public employee to speak on a matter of public concern deprives a self-governing society of information that may be vital to informed decision-making.

Azzaro v. County of Allegheny, 110 F.3d 968, 977 (3rd Cir. 1997) (en banc).

In determining whether a public employee's speech is worthy of First Amendment protection, it first must be determined if it addresses a matter of "public concern". *Johnson v. Multnomah County*, 48 F.3d 420, 421 (9th Cir. 1995). Previously, the Court of Appeals recognized that this threshhold determination must be interpreted liberally in favor of protection. See *Edwards v. DOT*, 66 Wn.App 552, 561, 832 P.2d 1332 (1992).[6] Speech is on a matter of public concern if it relates "...to any matter of political, social or other concern to the community." Id. Only when speech "solely" addresses internal policy and personnel grievances it is wholly unprotected. *Lambert v. Richard*, 59 F.3d 134, 135 (9th Cir. 1995).

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[6]Similarly, the Washington Supreme Court recognized in an opinion that followed shortly on the heels of *Wilson*, "...that even the slightest tinge of public concern is sufficient to satisfy the first step..." (Emphasis added). *White v. State*, 131 Wn. 2d 1, 12 n.5, ___P.2d___ (1997).

As previously recognized speech which addresses a mixture of public and private concerns is nevertheless protected if, once matters relating to pay, hours, and working conditions are removed, the matter still addresses issues of public concern. See *Thompson v. City of Starkville,* 901 F.2d 456 (5th Cir. 1990) (Collecting cases). However, speech which addresses working conditions and morale can be afforded protections if it otherwise is of relevance to the public's evaluation of governmental performance. *Lambert v. Richard,* 59 F.3d at 137, *McKinley v. City of Eloy,* 705 F.2d 1110 (9th Cir. 1983).

Such a determination is made by examining "the content, form and context of a given statement, as revealed by the whole record." *Johnson v. Multnomah County,* 48 F.2d at 422 *quoting Connick v. Myers,* 461 U.S. 138, 147-48 (1983). Generally, such determinations involves a question of law, however, that is not absolute and when a factual dispute exists as to what was the speech, it must be determined by a fact-finder. See *Waters v. Churchill,* 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

In the instant matter, the trial court viewed the protected status of speech as a threshold legal

determination for the court prior to submission of this mixed question of law and fact to the jury. Given the factual nature of the inquiry, it is submitted that was an appropriate approach under *Waters* and the appellate court's view to the contrary was erroneous. As it is, the issue went to the jury on respondent's instructions over petitioner's objections and it is puzzling that the appellate court would usurp the jury's factual determination on an issue subject to obvious waiver.

It is suggested one of the underlying purposes of treating the protected status of speech as an issue of law is to ensure unpopular points of view are not drowned by popular sentiment. Here, the opposite occurred with the Court of Appeals, without the benefit of actually hearing the testimony, engaging in not only fact-finding, but fact creating.

Here, a portion of petitioner's speech could be characterized as resisting a bogus claim of gender discrimination. Such potentially "politically incorrect" speech should nevertheless have been afforded full protection. See generally *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir. 1991).

Content is the greatest single factor in the inquiry. *Johnson v. Multnomah County*, 48 F.2d at 425.

The inquiry is objective and speech can be deemed protected even if it was an unintended consequence. *Zorzi v. County of Putnam,* 30 F.3d 885, 897 (7th Cir. 1994). Contrary to the Court of Appeals' opinion, while the speaker's "motive" is a marginal factor that can be considered in close cases, it is no where near dispositive. *Johnson v. Multnomah County,* 48 F.3d at 425. See also *Azzaro v. County of Allegheny,* 110 F.3d 968, 978 (3rd Cir. 1977) (en banc).

There is no question the Court of Appeals, based on no more than its opinion on matters where credibility was critical, elevated motive over content.

The Court of Appeals' observation at page A-16 that speech occurring in the discharge of duties is likely to be unprotected is wrong and makes little sense. The whole purpose of the public employee First Amendment doctrine is to ensure that public employees do not relinquish First Amendment rights and to ensure when matters of public concern arise during the course of employment, the employee can speak out. See *Azzaro v. County of Allegheny,* 110 F.3d at 979. Speech has often been deemed protected when it addresses the basic functions within the employee's job duties. See, e.g., *Roth v. Veteran's Admin.*, 856 F.2d 1401 (1988).

Similarly, the Court of Appeals' observation that employee speech that is in the form of "opinion" is unworthy of protection is difficult to square with federal First Amendment jurisprudence. See *Rankin v. McPherson*, 483 U.S. 378, 388 107 S.Ct. 2891, 97 L.Ed.2d 1315 (1987). Under federal precedent, even recklessly false speech may be worthy of protection. See *Johnson v. Multnomah County, supra*.[7]

Finally, with respect to the "guidelines" of the Court of Appeals', it is noted that it is a simple truism that a manager may have less First Amendment protection to speak out against an agency's policies, but such a consideration is more properly part of the second element of a First Amendment claim - the *Pickering* balance. See *Wheaton v. Webb-Petitt*, 931 F.2d 613, 618 (9th Cir. 1991). However, when it comes to management employees, it is a "curious logic" indeed to provide no or little First Amendment protection to a manager who often is in the best position to influence

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[7]The Court of Appeals made such an observation on an extremely narrow reading of *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988). In *Koch* the court never held opinions were per se unworthy of full protection but simply held that by "content, form and context" the opinion at issue therein was unprotected.

higher officials to not engage in potentially illegal, unethical or wasteful courses of conduct. See *Gross v. Winters*, 876 F.2d 165, 173 (D.C. Cir. 1989).

Federal cases have made it exceptionally clear that the fact that an employee's statement is not made to the public "does not" affect a First Amendment analysis. See, e.g. *Fox v. District of Columbia*, 83 F.3d 1491, 1494 (C.A.D.C. 1996). As noted in *Fox* at 1494 "...we are not surprised that our search has yielded no case supporting the idea that a communication made within internal channels is on that account any less likely to be about a matter of public concern".

While this is not a case where the employee's speech addressed rampant illegality, protected speech also includes that which addresses potential misuse of public funds, wastefulness, and the competency and efficiency of public service. See *Hyland v. Wonder*, 972 F.2d 1129, 1137-38 (9th Cir. 1992). Even expression of indignation about a supervisor's job performance is protected as is in some circumstances belligerent and indolent speech. See *Johnson, supra*; See also *Sheppard v. Beerman*, 94 F.3d 823 (2d Cir. 1996).

On analysis of the content, form and context of petitioner's speech (which included both verbal

opposition and his "white paper") there is no question that petitioner's speech was on matters of public concern. By context, the Court of Appeals' focus was simply too narrow because it failed to recognize the historical background in which the dispute arose. Historically, Jack Wilson's management program had saved WSH pharmacy and had improved it to one of the best in the country. It was that management system that Jack was speaking up to protect. The whole purpose of the system was to maximize patient care. (RP83-5).

If one actually reads petitioner's "white paper" by content it addressed the need to conform to recognized national standards and a need to emphasize competency in this portion of the public sector over educational credentials that may not translate into effective and efficient performance of public duties. The "white paper" is also protesting against actions that could so severely impact staff morale that there would be a rash of resignations. All of these concerns were being raised in the context of a mental hospital pharmacy that, scant years earlier, was so badly managed that it teetered on failure, dragging the hospital down with it.

Not as directly, but sufficiently, the "white paper" addressed the gross waste of public funds that would result if the reorganization plans and credentialling system of the pharmacy would have to be scrapped.

While Katy Williams' underlying complaint was solely about self-interest, there is simply no question Jack Wilson's response addressed the core mission of the agency and how to maintain an efficient organization that conformed to national standards, which was successful in its mission of curing the ill. Such speech falls within the "hardcore" of public concern and should have been deemed worthy of the highest rung of First Amendment protection.

B. The Court of Appeals Misapplied The Balancing Test.

It is also beyond dispute that the Court of Appeals misapplied the balancing test which determines whether speech on public concern can nevertheless be subject to suppression. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Under that test, speech on issue of public concern can nevertheless be suppressed if it impedes legitimate government interest. See *Hyland v. Wonder*, 972 F.2d at 1139-40. See also *Hyland v.*

Wonder (II), ___ F.3d ___ (9th Cir. 06-25-97).

Recently, this Court has determined reasonable predictions of disruption are sufficient. See *Waters v. Churchill, supra*. However, the government has the burden of showing some disruption is probable and not merely possible. *Larkin v. Town of West Hartford*, 891 F.Supp. 719, 724-24 (Conn. 1995). *White v. State*, 131 Wn.2d at 16. Broad unsupported allegations are insufficient and the government's burden is to prove the very speech at issue caused the disruption complained of and not some other source. *Kincade v. City of Blue Springs. MO.*, 64 F.3d 389, 398 (8th Cir. 1995); *Waters v. City of Philadelphia*, 55 F.3d 886, 897 (3rd Cir. 1995). When the government employer fails to provide proper evidence of disruption, it is appropriate for a court to not even conduct the *Pickering* balancing test. *Kincade* at 398. See also *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1224 (9th Cir. 1996). As recognized in *Waters* plurality opinion, the seminal cases of *Pickering v. Bd. Of Educ.*, 391 U.S. 563 (1968); *Connick v. Meyer*, 461 U.S. 138 (1983); and *Perry v. Sindermann*, 408 U.S. 593 (1972) all came before the Court under circumstances where the employer was aware of the content of the speech and concededly fired

the employee because of it. *Waters v. Churchill, supra.*

In the instant matter, the respondents denied they retaliated against petitioner for engaging in protected speech. Under the above standards, you cannot both deny and justify. Yet, the Court of Appeals, apparently recognizing the total failure of proof by the State on this issue, endeavored to substitutes its opinions and speculations as to what the defendants could have based the adverse decision on even though no proof was presented to support the proposition. "Wilson's recalcitrance could have seriously impaired the Hospital's ability to maintain a harmonious and discrimination-free work place." (A-15) (Emphasis added). The Court of Appeals' manufacture of justifications that did not actually motivate the defendants was fundamentally erroneous. It should not be the function of a reviewing court to engage in "unadorned speculation as to the impact of speech" on a government enterprise. *Weisbush v. County of Los Angeles*, ___ F.3d ___ (9th Cir. 07-11-97).

The proof presented by respondents more properly went to causation and should not have been considered as part of the balancing test. See *White v. State*, 131 Wn.2d at 16.

As discussed above, the Court of Appeals clearly misapplied the law with respect to the protected nature of petitioner's speech and the total failure of the government to put anything on its side of the *Pickering* balance. It is respectfully suggested that the law in this area was so clearly established that no reasonable public official would have believed their conduct was lawful in retaliating for protected speech when they cannot even articulate a countervailing interest that would be served by doing so. See, e.g., *Edwards v. DOT*, 66 Wn.App at 564-65; *Lambert v. Richard*, 59 F.3d at 136.

It is humbly submitted that the judicial manufacture of post hoc justifications for suppression of public employee speech (especially on a fully developed record) has the potential and does fundamental injury to First Amendment rights of all public employees and such a process can only send a chill to public employees who now not only have to overcome the fear of employer retaliation before speaking up but also that relief and protection will be denied for reasons unrelated to anything articulated by the employer but created by the very judicial system from which he or she is seeking protection.

Having placed nothing on their side of the *Pickering* balance, the respondents gambled that a jury would find no causal link and lost. Such an issue under applicable precedent has always involved a question for the fact-finder. See, e.g. *Wytrwal v. Saw School Dist.*, 70 F.3d 165, 1717 (1st Cir. 1995); *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 335 (9th Cir. 1995).

C. Qualified Immunity In First Amendment Cases.

Public employee First Amendment rights have been clearly established for decades. See *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *White v. State*, 131 Wn.2d at 10.

Contrary to the state court opinion herein and as recently explored in an opinion of this court, factual identity to previous precedent is unnecessary before the law can be deemed "clearly established". See *United States v. Lanier*, ___ U.S. ___ (03-31-97).

As explained in Justice Souter's opinion in *Lanier*:

> This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the

> particular type of conduct at issue...But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

See also *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Government officials are charged with the knowledge of all constitutional and statutory development including all available decisional law. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1301 (9th Cir. 1988).

Once it is established that the law was clear, the burden shifts to the government to show that a reasonable officer could have believed, in light of settled law, that no constitutional rights have been violated. *Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1997).

As noted in *Melton v. City of Oklahoma City*, 879 F.3d 706, 727-29 (10th Cir. 1989) there is a clear split of authority among the federal circuit courts as to whether or not the *Pickering* balancing test can or should be incorporated in the qualified immunity analysis. The Ninth Circuit has clearly rejected the

strict application of the balancing test in an immunity analysis because it would "eviscerate whistle blower protection for public employees". *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1410 (9th Cir. 1988).

In the instant matter, obviously the Court of Appeals' qualified immunity analysis was skewed by its willingness to manufacture a speculative justification. However, even without such a blatant analytical error, it would appear the opinion at issue herein requires a factual identity of precedent well beyond the controlling precedent of this court and even beyond that of the circuit courts which are more apt to grant qualified immunity on public employee First Amendment claims.

On reversal of the appellate court's determination on the merits, its grant of qualified immunity also must be reversed.[8]

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[8]The opinion below also reversed a civil conspiracy claim brought under state common law. However, given the damages were awarded in the form of a general verdict, the presence of such a claim should not impede a reversal and remand with reinstatement of the underlying verdict. See *Wheeler v. Catholic Archdiocese*, 124 Wn.2d 634, 641-42, 880 P.2d 29 (1994).

CONCLUSION

The opinion at issue herein works a great injustice and does mischief to our First Amendment. It is contrary to well established precedent of this and many other courts. While pragmatic concerns place limitations on the speech of public employees as compared that of private citizens, it is suggested such concerns must be the actual reasons for governmental action and not the subject of judicial host hoc manufacture. The errors in the opinion at issue herein have a true capacity for repetition that will not end until the highest court speaks once again on the subject matter.

It is humbly submitted that it does the First Amendment and public no good and probable evil when there is even a scintilla of confusion as to the scope, parameters, and procedures applicable to a public employee's First Amendment rights to speak out on issues of public concern. Public employees are our first line of defense against the unlawful or misguided. Their right to speak should not be as narrowly construed as done in the opinion at issue herein.

It is respectfully prayed a writ of certiorari issue and after full consideration the state appellate court

decision at issue be reversed and remanded with direction to reinstate the jury's verdict.

Respectfully submitted,

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APPENDIX A

SEINFELD, C.J. - John Wilson, a pharmacist at Western State Hospital, claimed that Hospital management wrongly removed him as director of the pharmacy department in retaliation for certain comments he made regarding personnel management. A jury agreed and awarded Wilson $9,000,000.00 for this violation of his constitutional right of free speech. We hold that the Hospital's interest in proper personnel management outweighs the minor "public concern" content of Wilson's comments. Accordingly, Wilson's speech was not protected by the First Amendment and the trial court erred in submitting the free speech claim to the jury. Thus, we reverse with directions to dismiss.

FACTS

When the Hospital hired Wilson as director of its pharmacy department, it was experiencing difficulties with its Medicare certification and its accreditation by the Joint Commission on Accreditation of Healthcare Organizations. The loss of the certification and accreditation could have cost the Hospital about $40 million in annual revenue from the federal government. As the pharmacy's director, Wilson had supervisory and management responsibility,

but his job description and pay scale were the same as the Hospital's other clinical pharmacists.

Wilson took several steps to bring the pharmacy into compliance with federal requirements. He developed policies and procedures; designed a degree-blind, skills-based pharmacist credentialling system; and implemented several workload measurement systems. The pharmacy department improved during Wilson's tenure, and Wilson received positive performance evaluations.

Wilson added two clinical pharmacists to the staff: Kathleen Williams and David Watson. Wilson encouraged Williams during her first two years. He promised that he would give her more desirable assignments as she developed her expertise and passed the competency examination he had developed. In particular, she said he would reduce the number of hours that she was required to dispense drugs, allowing for an increase in clinical work, the more sought after assignment. But this did not occur.

Wilson continued to require Williams to dispense drugs 14 hours per week but limited Watson's dispensing time to a maximum of 10 hours per week. Although Watson had not taken the competency examination and despite Wilson's own "degree-blind" credentialling system, Wilson justified this discrepancy by pointing to Watson's

pharmacy degree and post-doctoral training.

Williams complained to Wilson, requesting him to equalize the dispensing hours. When Wilson failed to respond, Williams addressed a written complaint to Dr. Darrell Hamilton, former Hospital superintendent, and then current director of professional services. Dr. Hamilton agreed with Williams and directed Wilson to equalize the dispensing time and provide dispensing time data for each of the clinical pharmacists.

Displeased, Wilson discussed the situation with his pharmacy management team and decided to write a "White Paper" to "educate this man . . . . [because h]e doesn't understand gender discrimination criteria." Wilson argued that adjusting William's dispensing time would destroy his management system, leading to poorer patient care: "I would have every other pharmacist in the department coming in and saying, well, now I want this and I want that, and we just couldn't - it would have just caused a terrible situation among our staff. It just would have been unworkable, totally unworkable."

When Wilson failed to provide the data, Dr. Hamilton directed him to stop workload measurement procedures because they were counter-productive and to equalize Williams's and Watson's dispensing times. As a

result, Wilson threatened to resign.

In response, John Reynolds, the Hospital's new superintendent, met separately with Wilson, and then with Wilson, Williams and Travis Aitken, the Hospital's personnel officer. Following these meetings, Reynolds requested an Office of Equal Opportunity (OEO) investigation and asked Wilson to try to reconcile with Williams.

Wilson met with Williams but the meeting apparently was unsatisfactory as Williams proceeded to file a gender discrimination complain with OEO. The OEO investigated the claims and then recommended that the Hospital equalize William's dispensing time with Watson's. It also proposed a settlement. Although Williams and Aiken approved the proposal, Wilson refused to agree to it.

About five months after Williams's initial complaint, 11 of the Hospital's 14 pharmacy technicians signed a union-sponsored grievance against Wilson attacking his management practices. Wilson alleged that Williams incited the technicians to grieve and provided them with information supporting their complaint.

After efforts to resolve the grievance failed, Dr. Hamilton, then Director of Professional Services,

temporarily removed Wilson. To gain a better understanding of the situation, Dr. Hamilton decided to manage the department himself. He also brought in two outside consultants, Dr. Paul Burkhart, the pharmacy director at the University of Washington Medical Center, and Richard Ager, the pharmacy director at Eastern State Hospital. The consultants recommended a department reorganization and apparently suggested that, under the circumstances, Wilson could no longer be effective manager.

Dr. Hamilton removed Wilson as director and resigned him to another pharmacy position with equal pay. Williams was the only clinical pharmacist interested in the then-vacant director position so Dr. Hamilton appointed her as the new director.

When Wilson returned after several months from a leave of absence, he worked under Williams's supervision and according to Wilson, was poorly treated. There was no private offices available at that time so, Wilson had to work at desk near the reception area. Wilson testified that this was demeaning and embarrassing. Further, Wilson claimed that Watson secretly tape recorded a meeting between the two of them and stole one of his computer disks.

Sometime later, Dr. Ira Klein became Wilson's supervisor. Wilson contends that Dr. Klein offered him additional post-doctoral training, but later delayed in following through with the offer. Eventually, Dr. Klein agreed to the training if Wilson would agree to submit a post-dated letter of resignation. Wilson declined on the grounds that this would be unethical.

At this point, Dr. Klein resigned. Dr. Hamilton, his new supervisor, directed Wilson to work on extracting pharmaceutical profile information from patient charts in the medical records department. His salary and benefits remained the same. Wilson, however, claimed that this task was demeaning and beneath his professional skill level; that the physical work environment was an unpleasant basement room; and the he was not adequately equipped as he did not have a private room, a computer, or library access.

Meanwhile, Wilson received two outside research grants that required much of his time. To accommodate his schedule, Hospital administration permitted Wilson to work less than half-time and later allowed him to reduce his work hours to 10 hours per week.

Dissatisfied, Wilson sued the State of Washington, Dr. Hamilton, William, Watson, and Reynolds (the

defendants). He claimed that his comments "against settling a false and frivolous claim of gender discrimination . . . constituted speech on matter of public concern protected by the 1st Amendment and the public policy of the State of Washington." He alleged that the defendants, "[i]n retaliation for said advocacy," "demoted" him by removing his director responsibilities and engaged in a civil conspiracy.[1] The jury found for Wilson on the free speech and civil conspiracy claims and awarded him $400,000 in economic damages, $8,000,000 in non-economic damages, and $600,000 in punitive damages.[2]

The defendants contend that the trial court erred in allowing the jury to decide the free speech claim as Wilson's comments were not protected speech. The also challenged the trial court's denial of their motion to dismiss the civil conspiracy claim for insufficient evidence.

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[1]At various points throughout the proceedings, the trial court dismissed Wilson's claims of fraudulent misrepresentation, gender discrimination, due process violations, harassment, defamation, tortious interference with a business relationship, and outrage. Wilson does not appeal the dismissal of any of these claims.

[2]Two hundred thousand dollars each against Dr. Hamilton and Reynolds; $100,000 each against Williams and Watson.

FREE SPEECH CLAIM

When a public employee claims a violation of free speech, the court must consider and resolve the tension between two competing interests. *Pickering v. Board of Educ. Of Township High Sch. Dist.*, 205, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L. Ed. 2d 811 (1968). On the one hand, public employees have a First Amendment right to comment on matters of public interest, even when such speech involves the agencies who employ them. *Pickering*, 391 U.S. at 568. On the other hand, public employer shave a legitimate interest in fulfilling their public mission and must be able to act accordingly. *Pickering*, 391 U.S. at 568.

[1] Initially, the employee claiming a free speech violation must show that the speech in question is entitled to constitutional protection. *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Here, Wilson claims that his comments about the management of the pharmacy department, as set out in the "white paper", deserve such protection.

To determine whether the Constitution protects this speech, the court must ask: (1) Does the speech deal with matters of public concern?; (2) If so, is the employee's

free speech interest greater than his employer's interest in promoting the efficiency of the public services it performs?; (3) If so, was the speech a substantial motivating factor in his discharge or transfer?; and (4) If so, in the absence of the protected speech, would the employer have made the same decision? *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684; 75 L. Ed. 2d 708 (1983); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d. 1366 (1990).

I

PRESERVATION

[2] Defendants contend that the trial court erred by permitting the jury to determine the first two elements of the inquiry. Wilson claims that the defendants did not raise the issue before the trial court by moving for dismissal at the close of Wilson's case or for a directed verdict at the end of their own case. They did, however, move for dismissal of Wilson's First Amendment claim, thereby giving the trial court the opportunity to consider and rule on the issue. Accordingly, we too will consider it. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992); *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990); *East Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986).

II

PUBLIC CONCERN

[3] The trial court, not the jury, must decide, as a question of law, whether speech relates to an issue of public concern. *Rankin v. McPherson*, 483 U.S. 378, 386 n. 9, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987); *Binkley*, 114 Wn.2d at 382; *Edwards v. Department of Transp.*, 66 Wn.App. 552, 560, 832 P.2d 1332 (1992). Thus, the trial court erred in allowing the jury to decide this question and we review the issue de novo. *Connick*, 461 U.S. at 148 n.7, 150 n.10; *Binkley*, 114 Wn.2d at 373.

[4] The employee has the initial burden of proving that the speech touches on matters of public concern. *Connick*, 461 U.S. 147-48; *Binkley*, 114 Wn.2d at 382. If the employee fails to bear that burden, the inquiry ends. *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986). In deciding whether Wilson met this burden, we look to the content, form, and context of the speech as revealed by the entire record. *Connick*, 461 U.S. at 147-48. We also consider the speaker's intent - Did he mean to raise an issue of public concern or simply intend to further a personal interest? *Edwards*, 66 Wn.App. at 560.

Mere cloaking of otherwise private matters in the mantle of public concern is insufficient to raise First

Amendment concerns. *Connick*, 461 U.S. 147-48; *Binkley*, 114 Wn.2d at 387. An employee who acts as a concerned citizen interested in bringing problems to light more likely raises a matter of public concern than does one who attempts to rectify work place problems. *Binkley*, 114 Wn.2d at 385. Further, speech that occurs during the discharge of an employee's duties likely does not touch on matters of public concern. *Koch v. City of Hutchinson*, 847 F.2d 1426 (10 Cir.) *cert. denied*, 488 U.S. 909 (1988). Likewise, speech that offers the speaker's personal opinions or beliefs does not implicate matters of public concern, especially when it occurs in the work setting. *Koch*, 847 F.2d at 1447. Finally, a speaker who is part of management and is thereby obligated to implement its policies but who, instead, criticizes the policies and refuses to support them, might not be able to call upon the First Amendment for protection. *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983).

These guidelines indicate a judicial sensitivity to the adverse consequences of providing constitutional protection for all statements made by public employees. *Berg v. Hunter*, 854 F.3d 238, 242 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). Uncontrolled employee debate about the wisdom of internal office decisions could

seriously impact productivity and affect the public institution's ability to carry out its mission. *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985). Also, if every comment was of public concern and deserving of constitutional protection, every institutional response to a comment could provoke judicial scrutiny. *Berg*, 854 F.2d at 242.

Wilson argues that his comments relate to the quality of care that State mental hospital patients receive and, thus, are a matter of public concern. He contends that a failure to follow his work assignment plan would directly affect the care received by the Hospital's patients.

Of course, the quality of patient care provided by state institutions is of public concern. But Wilson's speech is not clearly connected to the provision of quality patient care. *See Mahaffey v. Kansas Bd. Of Regents*, 562 F.Supp. 887, 890 (D.C. Kan. 1983) (invoking a presumed public interest in the way public institutions are run, alone, is not sufficient to transform a personal matter into one of public concern); *Meyer v. University of Washington*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986) (individual grievance is not converted to issue of public concern by invoking a popular interest in the way public institutions are run).

Several federal court decisions are helpful in

applying the public concern guidelines to the facts at hand. The Seventh Circuit concluded that a teacher's speech criticizing class size and the lack of discipline, while of general interest to the public, was not a matter of public concern because the teacher intended her speech "to benefit only her personal interests in a private dispute with her employer." *Cliff v. Board of Sch. Comm'rs*, 42 F.3d 403, 409 (7th Cir. 1994). The *Cliff* court noted that the teacher complained only in response to criticism directed at her; she stated her complaint in the context of her own circumstances rather than in general terms; nothing indicated that she was speaking for teachers as a whole,; and the teacher made no effort to call public attention to the matter. *Cliff*, 42 F.3d at 410-11.

The Eleventh Circuit reviewed a case brought by a nurse-manager who alleged the hospital retaliated against her for speech concerning contaminated surgical instruments left in the surgical corridor. *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1276 (11th Cir. 1992). The *Pearson* court found the nurse's speech motivated by her own personal interest in maintaining her position and not being reprimanded. *Pearson*, 952 F.2d at 1278-79. Consequently, it determined that the speech was not protected by the First Amendment. *See also Ballard v.*

Blount, 581 F.Supp. 160, 164 (1983) (teacher's remarks about the manner in which teachers were assigned to classes, and development and approval process for syllabus are private issues even though plaintiff contended they could have an affect on the public), *aff'd*, 734 F.2d 1480, *cert. denied*, 469 U.S. 1086 (1984); *Knapp*, 757 F.2d 827, *Ferrara*, 781 F.2d 1508; *Mahaffey*, 562 F.Supp. 887 (teachers' criticism of class assignments not a matter of public interest despite contentions that assignments detrimentally affect students' educational process).

Here, Wilson directed his "white paper" to Dr. Hamilton, referring to it as "RESPONSE TO DR. KATHLEEN WILLIAMS['S] CONCERNS." The "white paper" contains the following four major sections: a summary, background information, an assessment, and recommendation. The summary section restates Williams's complaints and Wilson's responses. The background information section describes the then-current status of hospital pharmacist assignments, comments about Williams's work and likely future assignments, Wilson's recruiting efforts, Williams's philosophical concerns about Wilson's use of pharmacists, and a discussion of the Hospital's past, current and future reputation.

The assessment section focuses specifically on the

dispute with Williams. For example, point one begins, "Dr. Williams has misstated her situation to you . . . ." Point three states that "The hiring and task assignments of Dr. Watson were well justified . . . ." Wilson then comments about his goal to reorganize the department and his concern that implementing Williams's request would set "a dangerous precedent," undermine his role, and undermine the credentialling process. Wilson then devotes one full page of the vie and one-half page document to restating and responding to William's seven specific concerns.

The recommendation section contains six points, four of which are requests regarding the Williams controversy. Point three asks for immediate implementation of a "pharmacist workload measuring system" and point six asks for a formal review by the chair of pharmacy practices at the University of Washington or Washington State University.

Applying the *Connick* content, form, and context analysis, it is apparent that the "white paper's" content involves an internal office matter that affected Wilson's position within the Hospital. Wilson's speech, like that of the plaintiffs in *Ballard, Knapp, Ferrara, Mahaffey and Cliff*, it is criticism of the allocation of human resources. Wilson, like the plaintiff is *Cliff, Ballard, Knapp, Ferrara* and

Mahaffey, attempts to link his speech to the broader issue of patient care in order to invoke the mantle of public concern. The "white paper" however, basically is a justification of Wilson's administrative decisions and personnel assignments.

The form of the speech is a memo to Wilson's superior, Dr. Hamilton. Like the speech in *Cliff*, the comments are addressed solely to an internal audience. There is not indication of an intent to bring a problem to the public's attention.

The context in which Wilson wrote the "white paper" reinforces the conclusion that Wilson was dealing with an issue that affected his position at the Hospital, and only in directed with the general welfare of hospital patients. Wilson wrote his "white paper" after Hospital administration responded to Williams's complaint about her work assignment and her suggestion that she was a victim of gender discrimination. As Wilson himself stated, the administration's response threatened to undermine his role and responsibility.

Evidence as to Wilson's intent in writing the "white paper" comes from its content, form, and context. The above analysis of those three factors suggests that Wilson was seeking to rectify workplace problems related to the

discharge of his duties. The "white paper" contains his personal opinion as to the most desirable way to organize the pharmacy department. In summary, we see no significant difference between Wilson's speech and that of the plaintiffs in the foregoing cases. Thus, we conclude that the "white paper" raises issues of personal, not public concern.

All of the cases that Wilson cited are factually distinguishable from the instant case.[3] In each, the

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[3]*Givhan v. Western Consol. Sch. Dist.*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) (dismissal of teacher who publicly charged racially discriminatory policies and practices within school district); *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir.) (firing of county employee who made statements to coworkers and others accusing her supervisory of mismanagement and possible criminal conduct), *cert. denied*, 115 S.Ct. 2616 (1995); *Kincade v. City of Blue Springs*, 64 F.3d 389 (8th Cir. 1995) (dismissal of city engineer whose report to Board of Aldermen criticized engineering and construction of dam and misuse of public funds) *cert. denied*, 116 S.Ct. 1565 (1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992) (terminated of probation department volunteer who criticized juvenile hall conditions to judges was terminated), *cert. denied*, 508 U.S. 908 (1993); *Starrett v. Wadley*, 876 F.3d 808 (10th Cir. 1989) (discharge of county employee who complained of supervisor's sexual harassment and problems with alcohol); *Roth v. Veteran's Admin. Of Gov't of U.S.*, 856 F.3d 1401 (9th Cir. 1988) (discharge of physician hired to correct deficiencies in alcohol abuse unit who repeatedly reported wastefulness, mismanagement, unethical conduct, violations of regulations and incompetence); *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) (terminated of city inspector who cited facility

plaintiff charged misfeasance, malfeasance or nonfeasance by a public officer. In each, the plaintiff attempted in some fashion to bring the claim to the public's attention. In each, plaintiff's speech invoked a broad public issue that only tangentially affected the plaintiff's position within the organization. And in each, a successful resolution of the plaintiff's claim would have brought the plaintiff little more than the personal satisfaction of performing a public service. Moreover, none of the plaintiffs' speech occurred in the context of an ongoing management dispute.

Here, Wilson threatened that failure to make personnel decisions in accordance with his management plan would be detrimental to the Hospital. He was not seeking to inform the public that the administration was derelict in serving Hospital patients. Rather, he was justifying his own actions and philosophy and attempting

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for public safety hazard violations and who reported his supervisors for using city employees to perform private and political campaign work); *Cox v. Dardanelle Public Sch. Dist.*, 790 F.2d 668 (8th Cir. 1986) (dismissal of teacher who spoke publicly about school policies and practices); *McKinley*, 705 F.2d 1110 (firing of police officer who publicly criticized the city's decision to not give annual raises); and *White v. State*, 78 Wn.App. 824, 898 P.2d 331 (1995) (transfer of administrative assistant who reported case of suspected patient abuse), *review granted*, 128 Wn.2d 1024 (1996).

to protect his own position. Although the general topic of quality patient care is one of public import, the connection between that topic and Wilson's speech is tenuous. Accordingly, we conclude that Wilson made his comments on behalf of his own interest and the speech was not of public concern.

III

WEIGHING THE STATE'S INTEREST

[5] Even were we to assume the speech had some public concern value, the Constitution would not afford Wilson protection unless that value was greater than the Hospital's interest in fulfilling its mission. *Connick*, 461 U.S. at 147-8. This also is a question of law of the trial court to determine. *Rankin*, 483 U.S. at 386; *Binkley*, 114 Wn.2d at 382. Again, we review the issue de novo. *Connick*, 461 U.S. at 151 n.10.

Here, the Hospital's interest in having its employees efficiently and properly fulfill the Hospital's legal function clearly outweighed the slight public concern value of Wilson's speech. *Pickering*, 391 U.S. 563. The Hospital has a duty to resolve employee grievances and to maintain a discrimination-free work place. RCW 49.60.180(2), (3). It also has an interest in avoiding disruption and assuring compliance with management decisions. *Connick*, 461 U.S.

at 151; *Binkley*, 114 Wn.2d at 385; *Rankin*, 483 U.S. at 388. A public employer needs wide discretion and control over the management of its operation. *Connick*, 461 U.S. at 151. These interest were frustrated by Wilson's refusal to comply with his supervisor's requests.

Upon reviewing the facts and circumstances in context, it is clear that the Hospital's management decisions were appropriate in light of its mission. After Williams complained of unequal treatment, the Hospital had a duty to investigate and respond. RCW 49.60.180(2), (3). Ultimately, the Hospital administrators had the authority and responsibility to resolve this personnel dispute and to assure compliance with their directives. Wilson's recalcitrance could have seriously impaired the Hospital's ability to maintain a harmonious and discrimination-free work place.

In sum, the degree of public concern related to Wilson's speech was slight while the Hospital's interest in effective management and in not violating another employee's employment rights was significant. Constitutional protection for Wilson's speech would hinder management's ability to carry out its responsibilities. Thus, we conclude that the Hospital's legitimate interests outweighed any free speech interest that Wilson had in his

"white paper" comments, and that Wilson's speech was not entitled to constitutional protection. Accordingly, Wilson's First Amendment claim fails as a matter of law.

IV

QUALIFIED IMMUNITY

Additionally, defendants claim that the doctrine of qualified immunity shields them from liability. Wilson asserts that the defendants waived this affirmative defense by their failure to plead it.

[7-9] Qualified immunity is immunity from suit, not immunity from liability. *Alvarado v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988). Its purpose is to protect the individual government employee from the inhibiting effect that the fear of personal liability might create. *Savage v. State*, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995). It does not apply to the State when, as here, the State is sued in its respondeat superior capacity. *Savage*, 127 Wn.2d at 436. Thus, the trial court did not err in denying the State's motion for a judgment notwithstanding the verdict on this ground.

[10] We engage in a different analysis when we consider the applicability of the doctrine to the individual defendants. First, we note that a defendant may raise the defense at any stage of the litigation, including a post-trial

motion. *Krause v. Bennett*, 887 F.2d 362, 368 (2d Cir. 1989); *Alvarado*, 859 F.2d at 451 n.3. As the defendants here raised the issue at the close of their case and agin in memorandum supporting their motion for judgment notwithstanding the verdict, they did not waive the issue.

[11,12] Public officials are immune from suit unless the "law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806 86 L.Ed.2d 411 (1985). This means that the doctrine is not applicable to defendants if, by their conduct, they violated a clearly established constitutional right of which a reasonable person would have been aware. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) *aff'd.*, 922 F.2d 443 (8th Cir. 1990).

The applicability of qualified immunity to a particular individual is a question of law. *White v. State*, 78 Wn.App. 824, 837, 898 P.2d 331 (1995) *review granted* 128 Wn.2d 1024 (1996). A plaintiff seeking to rebut a defendant's claim of qualified immunity must demonstrate that the defendant's conduct interfered with a clearly established constitutional right. *White*, 78 Wn.App. At 837. "Clearly established" means that the contours of the right were so obvious at the time the official acted that a reasonable official would have understood that what he was

doing violated that right. *Brawner v. City of Richardson*, 855 F.3d 187, 192 (5th Cir. 1988) (citing *Anderson*, 482 U.S. at 640). Thus, the plaintiff "must do more 'than identify a clearly established legal test and then allege that the defendant has violated it. The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.'" *Alshuler v. City of Seattle*, 63 Wn.App. 389, 395, 819 P.2d 393 (1991) (quoting *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990)), *review denied*, 118 Wn.2d 1023 (1992).

An employee has a clearly established right to speak on an issue of public interest. *Brawner*, 855 F.2d at 192-3. And case law protects a public employee's speech that reveals the improper conduct of coworkers. *Brawner*, 855 F.2d at 193. But the record in this case does not support the conclusion that Wilson speech fits within these categories.

First, as we discussed in section II, Wilson's comments about the pharmacy's administrative structure do not qualify as speech of public concern. Second, a reasonable hospital administrator/manager dealing with Wilson's refusal to follow administrative directives would not have understood that he or she was violating Wilson's

free speech rights by reassigning him to another position of equal pay within the organization. To the contrary, a prohibition against the removal of a non-responsive manager would be unreasonable and could easily lead to organizational chaos. Thus, Wilson has failed to show that defendants interfered with his "clearly established" constitutional free speech rights. Consequently, the individual defendants may claim the defense of qualified immunity.

V

CIVIL CONSPIRACY

[13] To establish a civil conspiracy, Wilson must prove by clear, cogent and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967). Mere suspicion or commonality of interests is insufficient to prove a conspiracy. *Corbit*, 70 Wn.2d at 529.

Wilson conceded that the removal of his working title and reassignment was not unlawful. It follows then that he seeks to prove the conspiracy by the second prong -

that his removal and transfer was accomplished by unlawful means. To support this, he offers, as the illegal acts, Watson's secretive taping of their meeting. Watson's alleged theft of his computer disks, and defamation.

A. Secret Taping and Theft of Computer Disk

Viewing the evidence in a light most favorable to Wilson, and recognizing that Watson's taping and computer disk appropriation may have been illegal, there is no evidence that anyone other than Watson was involved in these acts. Thus, these acts cannot support the conspiracy theory.

B. Defamation

To show defamation, Wilson alleges that Williams said he was "out to get the technicians." Without more, this is not defamatory. Moreover, according to the record, Williams never made this statement; another individual did.

C. Technician's Grievance Against Wilson

Finally, we discuss whether evidence of the technician's grievance against Wilson supports his conspiracy claim. Wilson did not specifically cite this to support the claim either in his appellate brief or in oral argument. He did, however, include comment about his incident in his discussion of the facts. Assuming that

Wilson intended this comment as argument, we find the argument lacks merit.

As we stated above, a plaintiff seeking to provide conspiracy must show that two or more people combined to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Wilson provided no authority that Williams, if she did communicate with the technicians about their grievance, acted unlawfully. Williams testified that any information she provided to the technicians was necessary to the discharge of their duties. Two other pharmacy technicians testified that the technicians decided to file the grievance because they failed to obtain a satisfactory resolution of identified concerns and that filing a grievance was the "next step." Wilson's mere suspicions will not support his conspiracy theory.

As we find no evidence of illegal act by two or more individuals, the civil conspiracy claims also fails.

We vacate the judgment and remand with instructions to dismiss the action.

MORGAN and BRIDGEWATER, JJ., concur.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

JOHN R. WILSON, Petitioner, vs. STATE OF WASHINGTON; R. DARRELL HAMILTON, M.D., in his official and individual capacity; KATY WILLIAMS, in her official and individual capacity; DAVID WATSON, in his official and individual capacity; JOHN REYNOLDS, in his official and individual capacity; and JOHN and JANE DOES 1 through 5, in their official and individual capacity, Respondents.	)	No. 64986-3 ORDER C/A No. 19855-0-II

All five members of Department II of the Court considered the matters set on its May 6, 1997, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.

I CERTIFY THAT THIS ORDER WAS ENTERED BY THE COURT ON THIS 6th DAY OF MAY, 1997.

_____

C.J. MERRITT, CLERK

APPENDIX C

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FILED
SEP 24 1997
CLERK

NO. 97-344

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN R. WILSON,

Petitioner,

v.

THE STATE OF WASHINGTON, R. DARRELL HAMILTON, M.D.; KATY WILLIAMS; DAVID WATSON; AND JOHN REYNOLDS,

Respondents.

On Petition For A Writ Of Certiorari To The Washington Court of Appeals, Division II

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I. STATEMENT OF THE CASE

Petitioner's Statement of the Case is frequently inaccurate and overlooks the severe performance problems and insubordination of the Petitioner, which led to the removal of his management responsibilities. Wilson cites to the record, frequently referring only to his own testimony, but those references rarely support the broad assertions contained in the Petition. Wilson emphasizes his performance as a state hospital pharmacy manager as if the quality of his management was material to the issues presented for review. However, Wilson's general performance as a pharmacy manager is not material to analysis of First Amendment issues presented in this case.

The material facts are few. Wilson, as manager of the pharmacy of a Washington State mental health hospital, allowed Watson, a male doctor of pharmacy, to dispense prescriptions only 10 hours per week, but required Williams, a female doctor of pharmacy and Watson's senior, to dispense prescriptions 14 hours per week. The remainder of their week was spent doing clinical work in the hospital wards, which was preferred over prescription dispensing. This disparity in assignments was admitted. [RP 598, 327-28, 573] Wilson had no knowledge of Watson's clinical ability when he was hired [RP 576-77, 579], but Watson was promised that he would not be required to dispense more than 10 hours per week. [RP 327, 574-76, 867] Additionally, Wilson required Williams to be "competency tested" when her male counterparts were not. [RP 583]

As a consequence of this treatment, Williams wrote Wilson on October 23, 1989, complaining about

discrimination. [App. C; Ex. 43][1] After failing to get Wilson's attention, Williams wrote to Dr. Hamilton, Wilson's supervisor. [App. D(1); App. D(2); Ex. 21] Not hearing from Hamilton after meeting with him, Williams wrote again. [App. E; Ex. 58]

Thereafter, on December 14, 1989, Williams was told that Wilson had indicated to Hamilton that dispensing time would be equalized. [App. E; Ex. 58 (handwritten note)] Hamilton wrote to Wilson on December 14, 1989, telling him that "Ms. Williams has a legitimate complaint," that she had a right to file a complaint, and that if Wilson failed to equalize assignments he (Hamilton) would do so. [App. F; Ex. 8] Hamilton added, "I trust you will take immediate steps to correct this situation." [App. F; Ex. 8][2] On December 29, 1989, when Wilson had not equalized assignments for Williams as instructed, Hamilton again wrote to Wilson [App. G; CP 226]:

> You leave me no choice but to give you the following directive: <u>You are to immediately balance the dispensing time for Katy Williams so that she will not exceed the dispensing time of the other Pharm.D.</u> [Emphasis Hamilton's.]

There is no dispute that Wilson ignored these direct orders. Hospital Superintendent Reynolds concurred in Hamilton's decisions. [Ex. 21] Wilson regarded this as "the last

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[1] All "Ex." citations are to trial exhibits. Reference to Appendices to the brief are denoted "App."

[2] Wilson states [Pet. 3, 4] that "while Dr. Wilson was on vacation, Hamilton and Williams met behind Dr. Wilson's back. (RP 324, 677)." In fact, Wilson knew of this, intentionally took the day off, and sent the message to those assembled to "stop this nonsense." [RP 475]

straw," [RP 433] and he refused to comply with the order. [RP 688-89, 953]

In addition to her complaint to hospital management, Williams filed a discrimination complaint with the Washington State Department of Social and Health Services' Office of Equal Opportunity. After an investigation [RP 437, 611], the OEO proposed a settlement by which Williams would receive equality in dispensing time and an apology from Wilson [Ex. 12]. Williams and the hospital personnel officer approved the proposed settlement, but Wilson was "furious." [RP 438-39]

On January 3, 1990, Wilson gave Hamilton what he called his "white paper" to "educate this man who doesn't understand gender discrimination criteria." [RP 331] The document was entitled "Response to Dr. Kathleen Williams Concerns." [App. H; Ex. 9][3] This is the only speech in this case for which constitutional status is claimed. In this document, Wilson defiantly reminded Hamilton that he, not Hamilton, would be making work assignments in the pharmacy [App. H; Ex. 9, pp. 1-2]:

> I have full authority and responsibility via Merit System Rules to assign job description tasks in different proportions to persons in identical job descriptions as I determine necessary to best meet patient and department needs, . . . [Emphasis Wilson's.]

Wilson distributed this "white paper" only to Hamilton, his supervisor; the Hospital Superintendent; the Hospital's personnel officer; Williams; and Williams's

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[3] Exhibit 9 included a hand-scribbled transmittal memo which is omitted from Appendix H.

husband, who was employed at a private hospital. [RP 593-94] The only purpose of the "white paper" was to defend against Williams's complaint of discrimination and permit Wilson to prevail over his supervisor's direction to cease discrimination.

In May 1990, 11 of the 14 pharmacy technicians signed a union-sponsored grievance against Wilson [RP 337] involving 50 allegations of mismanagement and misconduct. [Ex. 14][4] The principal complaints were that he was: requiring technicians to take competency tests in addition to those given by the State Personnel Board [RP 346][5]; requiring that employees report their activities on fifteen minute intervals throughout each day [RP 361-62, 371-73]; making every decision in the pharmacy a subject for his task forces [RP 773]; and creating an operational task force structure [Ex. 39; RP 375, 643] which encroached upon the employees' pharmacy time [RP 1077, 376-77, 763-74], sometimes resulting in three or four meetings a day [RP 769] in which the task forces concerned themselves with such minutiae as where to locate the pen on work counters. [RP 773] These and other complaints[6] contributed to a buildup of resentment about Wilson's management and created the perception that these practices interfered with the performance of the

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[4] Wilson states that Williams "fomented and was the motivating force behind the [employee] grievance." [Pet. 7] The truth is that, although Williams was aware that union members were planning to file a grievance, she was not involved in it. [RP 386]

[5] Following a hearing on another grievance about Wilson's testing of employees, it was determined that Wilson's testing of employees in addition to tests given by the State Personnel Department was improper, and Wilson was ordered by the State Personnel Board to discontinue the practice. [RP 421]

[6] Wilson also had developed an attendance problem which became the subject of numerous complaints. [RP 932, 950-51]

technicians' jobs. [RP 377-79, 382] The acknowledged objective of the technicians' grievance was to get rid of Wilson as director of the pharmacy. [RP 386]

Upon receipt of this grievance, hospital management sought to evaluate pharmacy operation. Hamilton relieved Wilson of his management responsibilities for two weeks [RP 616-17] while outside consultants evaluated pharmacy management and employee unrest. [RP 480-81; Ex. 44] The first consultant was Dr. Burkhart, director of pharmacy at the University of Washington Medical Center and vice-chair of the Department of Pharmacy at the University of Washington Medical School. [RP 189] His report found numerous problems, among them, staff discontent, confusion about departmental organization, and "excessive emphasis" on documentation. [Ex. 38; RP 189] He concluded that the department needed to be reorganized. [RP 208-09, 224]

The second consultant, Richard Ager, pharmacy director at Eastern State Hospital, found that morale was "terrible" and that Wilson had imposed "unreasonable" time consuming requirements upon pharmacy staff. [CP 399] He told Hamilton that it would be difficult for Wilson to continue being the pharmacy manager. [RP 401] After receiving the consultants' evaluations, Hamilton relieved Wilson of his position as manager of the pharmacy.[7] [RP 494, 912] Dr. Harvey was first asked to be manager, but when he declined the position (which is a working title only and had no promotional or salary incentives), Dr. Hamilton appointed Williams. [RP 496, 618, 913, 994-95]

Upon returning to work after taking leave for

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[7] Wilson appealed his loss of title as director of pharmacy to the Personnel Appeals Board. The Board concluded that since his pay status, job description and classification as clinical pharmacist had not been changed, there was no demotion, and management had the right to reassign him to other work. [RP 619-21]

several months to recover from being replaced as the manager of the pharmacy, Wilson complained of his treatment.[8] [Pet. 8-10] When Wilson returned to the pharmacy, he was completely "out of control," defying all authority. [RP 740, 744, 932, 875, 747, 922-23, 503-04; Exs. 65, 72, 92, 93; RP 872, 874-75; Exs. 77, 78] He was absent without explanation frequently [RP 744, 932]; he was reprimanded for repeated personal use of the state's equipment, including the fax machine, telephone and computer [RP 740, 875]; he took portions of the state's computer printer home [RP 747]; he transmitted Washington Association of Pharmacists papers to a network of over thirty private pharmacies on the state fax equipment [RP 922-23]; and he transmitted documents to a private attorney defending a drug case. [RP 503-04] He failed to perform work assigned to him in a timely manner [Exs. 65, 72, 93], and he refused to listen to or follow instructions. [RP 872, 874-75; Ex. 77, 78] Wilson regularly authored memos which inaccurately reflected supervisor's instructions and conversations.[9] [RP 876]

Wilson was unable to get along in the pharmacy working under the supervision of those he once supervised.

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[8] Wilson asserts [Pet. 8] that "Williams played, or allowed others to play the song 'Hit the Road, Dr. Wilson' over the pharmacy public address system on many occasions [RP 706]." The song which was played by others was "Hit the Road, Jack", and Williams considered such conduct inappropriate and ordered it stopped. [RP 706, 713]

[9] This lead Watson, Wilson's supervisor after he returned to work in the pharmacy [RP 501], to tape a conversation with Wilson [RP 876], not in retaliation for Wilson's speech but as an exasperated response to Wilson's constant writing of inaccurate memos of their conversations. [RP 876] Such conduct may be a violation of law if done without consent. This lawsuit did not include a claim for the taping episode, and it occurred after Wilson had been removed as manager of the pharmacy by Hamilton. [RP 501]

He was reassigned to medical records under the direction of Dr. Klein, extracting medically significant information from patient files. [RP 525] Wilson's conduct did not change. [Ex. 80] Dr. Klein became exasperated with his frequent inaccurate memos and declined to respond to them. [Ex. 93] Responding to Wilson's defiant attitude, a new superintendent warned him that further "recalcitrance" and "insubordination" would not be tolerated. [Ex. 92]

Notwithstanding Wilson's insubordinate and disruptive conduct, he was allowed to remain an employee of the Washington State hospital pharmacy with no reduction in pay or job classification. In an administrative proceeding brought by Wilson, but not appealed, his reassignment to non-managerial duties was found not to be a demotion. [RP 619-621]

II. PROCEDURAL HISTORY

Wilson filed the Complaint in this case on June 10, 1992, in Pierce County Superior Court. The Complaint included allegations of fraudulent misrepresentation, retaliation, gender discrimination, violation of due process, outrage, defamation, tortious interference with a business relationship, and civil conspiracy.

On April 28, 1995, upon the Defendants' summary judgment motion, the trial court dismissed all claims except civil conspiracy, defamation, and outrage. On May 3, 1995, the first day of trial, the court heard Wilson's motion for reconsideration of the dismissal of the retaliation claim. The trial court reversed its earlier ruling, and the retaliation claim proceeded to trial. [RP 39]

At the close of Wilson's case, the trial court dismissed the outrage and defamation claims. [RP 1052, 1053] On May 18, 1995, the jury returned a verdict in favor of Wilson on claims of retaliation and conspiracy, and awarded damages totalling $9,000,000.

The defendants appealed to the Washington Court of Appeals, Division II. The Court of Appeals reversed the judgment with directions to dismiss Wilson's case. The court then denied Wilson's motion for reconsideration, and issued an amended opinion on December 20, 1996, correcting slight factual misstatements. The Court of Appeals opinion is set forth in Appendix A.[10]

Wilson petitioned for review of the Court of Appeals decision by the Washington Supreme Court. On May 6, 1997, the Washington Supreme Court denied review of the case.

III. THE PETITION SHOULD BE DENIED

Although Wilson attempts to present issues by using terms such as conflict, Wilson does no more than reargue the case, which was correctly decided by the Washington Court of Appeals. As this case presents no conflict, and no other basis exists to justify further review, the Petition should be denied. Wilson claims that the Washington Court of Appeals substantially misinterpreted controlling precedent in reaching its result. [Pet. 13] However, the Washington Court of Appeals decision relies upon the parameters set out in the decisions of this Court and numerous federal and state cases for differentiating between speech that is of public concern and that which is not. The Washington Court of Appeals properly applied those established guidelines. Thus, the claimed conflict between the Washington Court of Appeals opinion and controlling precedent does not exist.

The decision of the Court of Appeals was based largely upon the well-established law of Pickering v. Board

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[10] Due to numerous typographical errors in the Court of Appeals decision in Appendix A to the Petition for Certiorari, a correct copy of the decision is attached hereto.

of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); and Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Those cases describe the criteria applied by the Court of Appeals in this case.

Wilson's petition selects portions of several federal court opinions, straining their meaning to find some conflict with the Washington Court of Appeals opinion in this case. The Court of Appeals meticulously analyzed the content of Wilson's "Response to Dr. Kathleen Williams Concerns" [App. H; Ex. 9], concluding that in content, context, and evident purpose, it dealt only with workplace issues which threatened to undermine Wilson's position and role at the hospital. In conducting this analysis, the Washington Court of Appeals followed the mandates of the cases cited above.

Wilson's view of the governing law apparently assumes that if the criteria from his cited cases are applied, the result in every instance will be that the speech is constitutionally protected. However, these criteria have been provided to assist judges to differentiate between speech that is and speech that is not entitled to constitutional protection.

The Court of Appeals properly concluded that, after full consideration of the content, context, and purpose of the "white paper," this case presented a situation in which workplace speech was not constitutionally protected.

IV. THE WASHINGTON COURT OF APPEALS DECISION IS CORRECT

Wilson seems to argue that the Washington Court of Appeals was incorrect in deciding that his "Response to Kathleen Williams Concerns" was not protected speech solely because of Wilson's personal motivation. That is not

what the Court of Appeals did.[11] The Court first looked at the content of Wilson's "Response to Williams Concerns," digesting it in detail, concluding that the "content involves an internal office matter that affected Wilson's position within the Hospital" [App. A, p. 11] and that Wilson, like the plaintiffs in five cited federal cases,[12] "attempts to link his speech to the broader issue of patient care in order to invoke the mantle of public concern. The 'white paper,' however, basically is a justification of Wilson's administrative decisions and personnel assignments." [*Id.*]

The Washington Court of Appeals opinion next moved to the context element, noting that "Wilson wrote his 'white paper' after Hospital administration responded to Williams' complaint . . . As Wilson himself stated, the administration's response threatened to undermine his role and responsibility." [*Id.* at 11] Thereafter, the Court looked to Wilson's intent and found that he was seeking only to rectify workplace problems related to the discharge of his

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[11] The Court of Appeals said [App. A, pp. 7-8]:

> In deciding whether Wilson met this burden [proving that the speech touches on a matter of public concern], we look to the content, form, and context of the speech as revealed by the entire record. Connick, 461 U.S. at 147-48. We also consider the speaker's intent -- Did he mean to raise an issue of public concern or simply intend to further a personal interest? Edwards, 66 Wn. App. at 560.

[12] Ballard v. Blount, 581 F. Supp. 160, 164 (N.D. Ga. 1983); *aff'd* 734 F.2d 1480 (11th Cir.), *cert. denied* 469 U.S. 1086 (1984); Knapp v. Whitaker, 757 F.2d 827 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985); Ferrara v. Mills, 781 F.2d 1508, 1512 (11th Cir. 1986); Mahaffey v. Kansas Bd. of Regents, 562 F. Supp. 887 (D.C. Kan. 1983); Cliff v. Board of School Comm'rs, 42 F.3d 403, 409 (7th Cir. 1994).

duties.

The Court dutifully examined each of the many cases cited to it by Wilson, finding that "[a]ll of the cases . . . are factually distinguishable from the instant case" [*Id.* at 12], concluding that:

> [Wilson] was not seeking to inform the public that the administration was derelict in serving Hospital patients. Rather he was justifying his own actions and philosophy and attempting to protect his own position. Although the general topic of quality patient care is one of public import, the connection between that topic and Wilson's speech is tenuous. [*Id.* at 13].

To this Court, Wilson cited several federal cases and invites this Court to find some basis for his argument that the Washington Court of Appeals decided this case solely upon or by overly emphasizing Wilson's personal intent. The Court's step-by-step analysis shows otherwise. None of the cases Wilson cites support his argument.

The quote from Azzaro v. County of Allegheny, 110 F.3d 968 (3rd Cir. 1997), regarding the silencing of public employees, is a snippet of logic but it has no application to the facts of this case. The employee there was dismissed for complaining about sexual harassment by her supervisor. Plaintiff's position in that case corresponds to Williams' complaint of gender discrimination in this case, not to Wilson, who was found to be discriminating against her.

In Johnson v. Multnomah County, 48 F.3d 420 (9th Cir. 1995), those defending the county argued that "recklessly false statements" are not entitled to constitutional protection. After noting a split among the circuits on that issue, the court concluded that recklessly

false statements can be entitled to constitutional standing if they satisfy other requirements. The Johnson court, however, found that the employee was not involved in a dispute about internal administrative matters, as is the case here, but that she sought to call public attention to mismanagement and possible corruption by her supervisor, the outcome of which bore little expectation of personal benefit to her. Johnson is clearly not precedent for the instant case.

Lambert v. Richard, 59 F.3d 134 (9th Cir. 1995), does not involve a workplace dispute. The employee in Lambert "spoke as a union representative, not as an individual," and "she described departmental problems, not private grievances" she delivered her comment at a televised city council meeting. [*Id.* at 137.] No similar facts are present in the instant case.

Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990), involved two different kinds of employee speech. The plaintiff's complaint about denied promotions were found not to be protected speech because it was personal to him and made in the context of a workplace dispute. The second category of speech, about the impropriety of promotions given to some officers and denied to others, was determined to have constitutional protection because the employee did not stand to personally benefit from such speech.

In McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983), a police officer, acting for the police union, spoke to the city council and on television complaining about low police salaries and working conditions. The city decided he was a troublemaker and dismissed him. Understandably, the court found this speech to involve matters of public concern. McKinley provides no precedential implications for this case.

Lastly, Waters v. Churchill, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994), provides no basis to

find error in the Washington Court of Appeals decision. That case did not determine which speech was and which speech was not protected speech. *See* Waters, 511 U. S. at 668. It involved what procedures should be employed when the evidence of what was said is unclear. This case involves no uncertainty about what was said.[13]

The Washington Court of Appeals opinion, in addition to finding that Wilson's speech was not public speech entitled to constitutional protection, found that the employer's interest in complying with the mandates of law to maintain a discrimination-free workplace and in avoiding insubordination and disruption, outweighed Wilson's minimal speech interest. In making this second determination, the Court of Appeals again applied the dictates of both federal and state precedents.

Federal precedents provide clear authority that evidence of insubordination outweighs personal interests of individual employees, even when engaging in protected speech. Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); Arnett v. Kennedy, 416 U.S. 134, 168, 94 S. Ct. 1633, 1651, 40 L. Ed. 2d 15

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[13] Wilson extracted one gem of wisdom from Waters, 511 U.S. at 674:

> "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informal opinions."

However, Wilson neglects to add the court's other equally noteworthy observation:

> "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 675.

(1974); Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). Washington cases make the same point. See, e.g., Binkley v. Tacoma, 114 Wn.2d 373, 387, 787 P.2d 1366 (1990).

Weisbuch v. Los Angeles County, 119 F.3d 778 (9th Cir. 1997), cited by Wilson to this Court, provides authority that the employer's intent in avoiding expressions of policy differences between higher management and departmental managers overcomes an employee's interest in otherwise protected speech. In Washington, Dicomes v. State, 113 Wn.2d 612, 629, 782 P.2d 1366 (1990), reaches that same conclusion.

Wilson argues that the Washington Court of Appeals misapplied the balancing test due to an alleged lack of evidence that Wilson's conduct was disruptive and that the Court of Appeals manufactured such a justification. [Pet. 22-26] This view of the case simply ignores the voluminous evidence of conflict. The whole case was about Wilson's disruptions of hospital business and defiance of legitimate administrative authority. The Washington Court of Appeals did not manufacture Wilson's flat refusal to comply with hospital management's direct order to cease the discrimination he was practicing. [App. F, G, H; RP 688-89, 953]

In addition to the disruptive nature of Wilson's conduct, Washington State has an additional interest as an employer to be considered. Both federal and state statutory law require that public employers give equal treatment to male and female employees. [42 U.S.C. § 2000 (e)(2); RCW 49.60.180(3); App. B]

None of the several federal court decisions cited by Wilson suggest that a public employer's interest in dealing with insubordination such as was exhibited by Wilson in this case is outweighed by employee's speech interests. Wilson's implication that there was no evidence of disruption justifying employer action overlooks the turmoil

that engulfed the hospital in this case.

Wilson's attempt to reargue his case does not merit review by this Court. The Court of Appeals properly applied federal precedents to the facts in this case, and came to a proper result.

V. THE WASHINGTON COURT OF APPEALS PROPERLY APPLIED QUALIFIED IMMUNITY STANDARDS

Wilson asserts that the Washington Court of Appeals misapplied established precedent in finding that the individual defendants were entitled to qualified immunity for reassigning Wilson after his refusal to follow administrative directions. He suggests that the court required "factual identity" and was unduly influenced by "manufactured speculative justification" by the Washington Court of Appeals. [Pet. 28]

Wilson acknowledges that, under the authority of Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), a general awareness of the right of free speech is inadequate to defeat qualified immunity, but he argues that the Washington Court of Appeals went to the other extreme, requiring knowledge of precedents having "factual identity" with the case in question. The Court of Appeals opinion did not require that. It specified only what Anderson requires, that the right be "clearly established." This involves "a substantial correspondence between the conduct in question and prior law . . . " Wilson was, and is, unable to find or cite any prior case which substantially corresponds to the facts of his case in which qualified immunity was denied.

Wilson cites United States v. Lanier, ___ U.S. ___, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), but Lanier is not concerned with qualified immunity. It is precedent for the sufficiency of language to provide fair warning of

prohibited conduct under criminal law. Elder v. Holloway, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344, (1994), provides the standard in cases of qualified immunity. "All relevant precedents" must be considered. *Id.* at 512. Wilson's failure to defeat the individual defendants' qualified immunity was due to the absence of relevant precedent holding that blatant insubordination is an insufficient personal interest to outweigh the public employer's interests.

Wilson claims that the Washington Court of Appeals inappropriately incorporated the Pickering balancing test in its qualified immunity analysis and that there is a split of authority among the circuits on this question.

Wilson finds his "clear split of authority among the federal circuits" [Pet 27] to be disclosed in Melton v. Oklahoma City, 879 F.2d 706 (10th Cir. 1989) and Roth v. Veteran's Administration, 856 F.2d 1401 (9th Cir. 1988). No such split exists. The decisions of the federal courts concur uniformly that the balancing of the interests of the parties is properly part of a qualified immunity analysis.

Melton does not hold that the interests of the parties must be ignored in a qualified immunity analysis. The Melton Court recognized that balancing of interests in a qualified immunity analysis is inevitably difficult; and, therefore, "where Pickering balancing is required, the law is less likely to be well established than in other cases." The Melton court said:

> In some circumstances, the fact-specific nature of the Pickering balancing may include a determination of 'clearly established law' thereby giving rise to qualified immunity under Harlow." [p. 729]

Melton involved two different kinds of employee speech,

both emanating from a lawsuit against the city. The first was the employees sworn testimony in court. With regard to sworn testimony the court held:

> In our mind, a reasonable official would have been on notice that the City's interest in the effective and efficient functioning of its enterprise cannot outweigh an employee's right (and a citizen's duty) to testify truthfully at trial. [Court's emphasis.] [pp. 729-30]

The Court, commenting on the balance between the employee's right to communicating with a lawyer representing the party opposing the City and the City's interest in not having that occur said:

> [T]he balancing of these competing interests would not have been so clear to a reasonable official under these circumstances that we can say it constituted 'clearly established law' under Harlow. [p. 730]

Wilson argues that Roth v. Veterans' Administration, 856 F.2d 1401 (9th Cir. 1988), holds that balancing of interests was inappropriate to the analysis in qualified immunity cases. Roth held only that it would not adopt defendant's argument "for a broader reading of Benson because to do so would preclude effective first amendment rights." [*Id.* at 1408] Roth held that:

> "Because there are underlying factual issues regarding the extent of office disruption, we hold that the district court properly denied defendant's motion for summary judgment on Roth's first amendment claim."

Recent cases uniformly consider the clarity of the law with respect to both public employer interests and the nature of employee speech in a qualified immunity analysis. Williams v. Alabama State University, 102 F.3d 1179, 1183 (11th Cir. 1997); Burnham v. Ianni, 119 F.3d 668, (8th Cir. 1997); Grantham v. Trickey, 21 F.3d 289, 295 (8th Cir. 1994); Anderson v. McCotter, 100 F.3d 723, 727 (10th Cir. 1996).[14] Accordingly, no error of law occurred.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[14] When there is no evidence that employee conduct undermined effective functioning, qualified immunity is not appropriately considered. Chateaubriand v. Gaspard, 97 F.3d 1218 (9th Cir. 1996).

APPENDIX A

PUBLISHED OPINION
Filed December 20, 1996

SEINFELD, C.J. -- John Wilson, a pharmacist at Western State Hospital, claimed that Hospital management wrongly removed him as director of the pharmacy department in retaliation for certain comments he made regarding personnel management. A jury agreed and awarded Wilson $9,000,000 for this violation of his constitutional right to free speech. We hold that the Hospital's interest in proper personnel management outweighs the minor "public concern" content of Wilson's comments. Accordingly, Wilson's speech was not protected by the First Amendment and the trial court erred in submitting the free speech claim to the jury. Thus, we reverse with directions to dismiss.

FACTS

When the Hospital hired Wilson as director of its pharmacy department, it was experiencing difficulties with its Medicare certification and its accreditation by the Joint Commission on Accreditation of Healthcare Organizations. The loss of the certification and accreditation could have cost the Hospital about $40 million in annual revenue from the federal government. As the pharmacy's director, Wilson had supervisory and management responsibility, but his job description and pay scale were the same as the Hospital's other clinical pharmacists.

Wilson took several steps to bring the pharmacy into compliance with federal requirements. He developed policies and procedures; designed a degree-blind, skills-

based pharmacist credentialling system; and implemented several workload measurement systems. The pharmacy department improved during Wilson's tenure, and Wilson received positive performance evaluations.

Wilson added two clinical pharmacists to the staff: Kathleen Williams and David Watson. Wilson encouraged Williams during her first two years. He promised that he would give her more desirable assignments as she developed her expertise and passed the competency examination he had developed. In particular, he said he would reduce the number of hours that she was required to dispense drugs, allowing for an increase in clinical work, the more sought after assignment. But this did not occur.

Wilson continued to require Williams to dispense drugs 14 hours per week but limited Watson's dispensing time to a maximum of 10 hours per week. Although Watson had not taken the competency examination and despite Wilson's own "degree-blind" credentialling system, Wilson justified this discrepancy by pointing to Watson's pharmacy degree and post-doctoral training.

Williams complained to Wilson, requesting him to equalize the dispensing hours. When Wilson failed to respond, Williams addressed a written complaint to Dr. Darrell Hamilton, former Hospital superintendent, and then current director of professional services. Dr. Hamilton agreed with Williams and directed Wilson to equalize the dispensing time and provide dispensing time data for each of the clinical pharmacists.

Displeased, Wilson discussed the situation with his pharmacy management team and decided to write a "White Paper" to "educate this man. . . . [because h]e doesn't understand gender discrimination criteria." Wilson argued that adjusting Williams's dispensing time would destroy his management system, leading to poorer patient care: "I would have every other pharmacist in the department coming in and saying, well, now I want this and I want

that, and we just couldn't -- it would have just caused a terrible situation among our staff. It just would have been unworkable, totally unworkable."

When Wilson failed to provide the data, Dr. Hamilton directed him to stop workload measurement procedures because they were counter-productive and to equalize Williams's and Watson's dispensing times. As a result, Wilson threatened to resign.

In response, John Reynolds, the Hospital's new superintendent, met separately with Wilson, and then with Wilson, Williams and Travis Aiken, the Hospital's personnel officer. Following these meetings, Reynolds requested an Office of Equal Opportunity (OEO) investigation and asked Wilson to try to reconcile with Williams.

Wilson met with Williams but the meeting apparently was unsatisfactory as Williams proceeded to file a gender discrimination complaint with OEO. The OEO investigated the claims and then recommended that the Hospital equalize Williams's dispensing time with Watson's. It also proposed a settlement. Although Williams and Aiken approved the proposal, Wilson refused to agree to it.

About five months after Williams's initial complaint, 11 of the Hospital's 14 pharmacy technicians signed a union-sponsored grievance against Wilson attacking his management practices. Wilson alleged that Williams incited the technicians to grieve and provided them with information supporting their complaint.

After efforts to resolve the grievance failed, Dr. Hamilton, then Director of Professional Services, temporarily removed Wilson. To gain a better understanding of the situation, Dr. Hamilton decided to manage the department himself. He also brought in two outside consultants, Dr. Paul Burkhart, the pharmacy director at the University of Washington Medical Center,

and Richard Ager, the pharmacy director at Eastern State Hospital. The consultants recommended a department reorganization and apparently suggested that, under the circumstances, Wilson could no longer be an effective manager.

Dr. Hamilton removed Wilson as director and reassigned him to another pharmacy position with equal pay. Williams was the only clinical pharmacist interested in the then-vacant director position so Dr. Hamilton appointed her as the new director.

When Wilson returned after several months from a leave of absence, he worked under Williams's supervision and according to Wilson, was poorly treated. There were no private offices available at that time so, Wilson had to work at a desk near the reception area. Wilson testified that this was demeaning and embarrassing. Further, Wilson claimed that Watson secretly tape recorded a meeting between the two of them and stole one of his computer disks.

Sometime later, Dr. Ira Klein became Wilson's supervisor. Wilson contends that Dr. Klein offered him additional post-doctoral training, but later delayed in following through on the offer. Eventually, Dr. Klein agreed to the training if Wilson would agree to submit a post-dated letter of resignation. Wilson declined on the grounds that this would be unethical.

At this point, Dr. Klein resigned. Dr. Hamilton, his new supervisor, directed Wilson to work on extracting pharmaceutical profile information from patient charts in the medical records department. His salary and benefits remained the same. Wilson, however, claimed that this task was demeaning and beneath his professional skill level; that the physical work environment was an unpleasant basement room; and that he was not adequately equipped as he did not have a private phone, a computer, or library access.

Meanwhile, Wilson received two outside research

grants that required much of his time. To accommodate his schedule, Hospital administration permitted Wilson to work less than half-time and later allowed him to reduce his work hours to 10 hours per week.

Dissatisfied, Wilson sued the State of Washington, Dr. Hamilton, Williams, Watson, and Reynolds (the defendants). He claimed that his comments "against settling a false and frivolous claim of gender discrimination . . . constituted speech on a matter of public concern protected by the 1st Amendment and the public policy of the State of Washington." He alleged that the defendants, "[i]n retaliation for said advocacy," "demoted" him by removing his director responsibilities and engaged in a civil conspiracy.[1] The jury found for Wilson on the free speech and civil conspiracy claims and awarded him $400,000 in economic damages, $8,000,000 in non-economic damages, and $600,000 in punitive damages[2].

The defendants contend that the trial court erred in allowing the jury to decide the free speech claim as Wilson's comments were not protected speech. They also challenge the trial court's denial of their motion to dismiss the civil conspiracy claim for insufficient evidence.

FREE SPEECH CLAIM

When a public employee claims a violation of free speech, the court must consider and resolve the tension

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[1] At various points throughout the proceedings, the trial court dismissed Wilson's claims of fraudulent misrepresentation, gender discrimination, due process violations, harassment, defamation, tortious interference with a business relationship, and outrage. Wilson does not appeal the dismissal of any of these claims.

[2] Two hundred thousand dollars each against Dr. Hamilton and Reynolds; $100,000 each against Williams and Watson.

between two competing interests. *Pickering v. Board of Educ. Of Township High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). On the one hand, public employees have a First Amendment right to comment on matters of public interest, even when such speech involves the agencies who employ them. *Pickering*, 391 U.S. at 568. On the other hand, public employers have a legitimate interest in fulfilling their public mission and must be able to act accordingly. *Pickering*, 391 U.S. at 568.

Initially, the employee claiming a free speech violation must show that the speech in question is entitled to constitutional protection. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Here, Wilson claims that his comments about the management of the pharmacy department, as set out in the "white paper," deserve such protection.

To determine whether the Constitution protects this speech, the court must ask: (1) Does the speech deal with a matter of public concern?; (2) If so, is the employee's free speech interest greater than his employer's interest in promoting the efficiency of the public services it performs?; (3) If so, was the speech a substantial motivating factor in his discharge or transfer?; and (4) If so. in the absence of the protected speech, would the employer have made the same decision? *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990).

I
PRESERVATION

Defendants contend that the trial court erred by permitting the jury to determine the first two elements of

the inquiry. Wilson claims that the defendants did not preserve the issue for appeal. The defendants did not raise the issue before the trial court by moving for dismissal at the close of Wilson's case or for a directed verdict at the end of their own case. They did, however, move for dismissal of Wilson's First Amendment claim, thereby giving the trial court the opportunity to consider and rule on the issue. Accordingly, we too will consider it. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992); *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990); *East Gig Harbor Improvement Ass'n. v. Pierce County*, 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986).

II
PUBLIC CONCERN

The trial court, not the jury, must decide, as a question of law, whether speech relates to an issue of public concern. *Rankin v. McPherson*, 483 U.S. 378, 386 n.9, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987); *Binkley*, 114 Wn.2d at 382; *Edwards v. Department of Transp.*, 66 Wn. App. 552, 560, 832 P.2d 1332 (1992). Thus, the trial court erred in allowing the jury to decide this question and we review the issue de novo. *Connick*, 461 U.S. at 148 n.7, 150 n.10; *Binkley*, 114 Wn.2d at 373.

The employee has the initial burden of proving that the speech touches on matters of public concern. *Connick*, 461 U.S. 147-48; *Binkley*, 114 Wn.2d at 382. If the employee fails to bear that burden, the inquiry ends. *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986). In deciding whether Wilson met this burden, we look to the content, form, and context of the speech as revealed by the entire record. *Connick*, 461 U.S. at 147-48. We also consider the speaker's intent -- Did he mean to raise an issue of public concern or simply intend to further a

personal interest? *Edwards*, 66 Wn. App. at 560.

Mere cloaking of otherwise private matters in the mantle of public concern is insufficient to raise First Amendment concerns. *Connick*, 461 U.S. 147-48; *Binkley* 114 Wn.2d at 387. An employee who acts as a concerned citizen interested in bringing problems to light more likely raises a matter of public concern than does one who attempts to rectify work place problems. *Binkley*, 114 Wn.2d at 385. Further, speech that occurs during the discharge of an employee's duties likely does not touch on matters of public concern. *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988). Likewise, speech that offers the speaker's personal opinions or beliefs does not implicate matters of public concern, especially when it occurs in the work setting. *Koch*, 847 F.2d at 1447. Finally, a speaker who is part of management and is thereby obligated to implement its policies but who, instead, criticizes the policies and refuses to support them, might not be able to call upon the First Amendment for protection. *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983).

These guidelines indicate a judicial sensitivity to the adverse consequences of providing constitutional protection for all statements made by public employees. *Berg v. Hunter*, 854 F.2d 238, 242 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). Uncontrolled employee debate about the wisdom of internal office decisions could seriously impact productivity and affect the public institution's ability to carry out its mission. *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985). Also, if every comment was of public concern and deserving of constitutional protection, every institutional response to a comment could provoke judicial scrutiny. *Berg*, 854 F.2d at 242.

Wilson argues that his comments relate to the quality of care that State mental hospital patients receive

and, thus, are a matter of public concern. He contends that a failure to follow his work assignment plan would directly affect the care received by the Hospital's patients.

Of course, the quality of patient care provided by state institutions is of public concern. But Wilson's speech is not clearly connected to the provision of quality patient care. *See Mahaffey v. Kansas Bd. of Regents*, 562 F. Supp. 887, 890 (D.C. Kan. 1983) (invoking a presumed public interest in the way public institutions are run, alone, is not sufficient to transform a personal matter into one of public concern); *Meyer v. University of Washington*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986) (individual grievance is not converted to issue of public concern by invoking a popular interest in the way public institutions are run).

Several federal court decisions are helpful in applying the public concern guidelines to the facts at hand. the Seventh Circuit concluded that a teacher's speech criticizing class size and the lack of discipline, while of general interest to the public, was not a matter of public concern because the teacher intended her speech "to benefit only her personal interests in a private dispute with her employer." *Cliff v. Board of Sch. Comm'rs.*, 42 F.3d 403, 409 (7th Cir. 1994). The *Cliff* court noted that the teacher complained only in response to criticism directed at her; she stated her complaint in the context of her own circumstances rather than in general terms; nothing indicated that she was speaking for teachers as a whole; and the teacher made no effort to call public attention to the matter. *Cliff*, 42 F.3d at 410-11.

The Eleventh Circuit reviewed a case brought by a nurse-manager who alleged the hospital retaliated against her for speech concerning contaminated surgical instruments left in a surgical corridor. *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1276 (11th Cir. 1992). The *Pearson* court found the nurse's speech motivated by her own personal interest in maintaining her

position and not being reprimanded. *Pearson*, 952 F.2d at 1278-79. Consequently, it determined that the speech was not protected by the First Amendment. *See also Ballard v. Blount*, 581 F. Supp. 160, 164 (1983) (teacher's remarks about the manner in which teachers were assigned to classes, and development and approval process for syllabus are private issues even though plaintiff contended they could have an affect on the public), *aff'd.*, 734 F.2d 1480, *cert. denied*, 469 U.S. 1086 (1984); *Knapp*, 757 F.2d 827; *Ferrara*, 781 F.2d 1508; *Mahaffey*, 562 F. Supp. 887 (teachers' criticism of class assignments not a matter of public interest despite contentions that assignments detrimentally affect students' educational process).

Here, Wilson directed his "white paper" to Dr. Hamilton, referring to it as "RESPONSE TO DR. KATHLEEN WILLIAMS['S] CONCERNS." The "white paper" contains the following four major sections: a summary, background information, an assessment, and recommendations. The summary section restates Williams's complaints and Wilson's responses. The background information section describes the then-current status of hospital pharmacy practice, the philosophy Wilson used to decide pharmacist assignments, comments about Williams's work and likely future assignments, Wilson's recruiting efforts, Williams's philosophical concerns about Wilson's use of pharmacists, and a discussion of the Hospital's past, current and future reputation.

The assessment section focuses specifically on the dispute with Williams. For example, point one begins, "Dr. Williams has misstated her situation to you . . . ." Point three states that "The hiring and task assignments of Dr. Watson were well justified . . . ." Wilson then comments about his goal to reorganize the department and his concern that implementing Williams's request would set "a dangerous precedent," undermine his role, and undermine the credentialling process. Wilson then devotes one full

page of the five and one-half page document to restating and responding to Williams's seven specific concerns.

The recommendation section contains six points, four of which are requests regarding the Williams controversy. Point three asks for immediate implementation of a "pharmacist workload measuring system" and point six asks for a formal review by the chair of pharmacy practices at the University of Washington or Washington State University.

Applying the *Connick* content, form, and context analysis, it is apparent that the "white paper's" content involves an internal office matter that affected Wilson's position within the Hospital. Wilson's speech, like that of the plaintiffs in *Ballard, Knapp, Ferrara, Mahaffey* and *Cliff*, is a criticism of the allocation of human resources. Wilson, like the plaintiffs in *Cliff, Ballard, Knapp, Ferrara,* and *Mahaffey*, attempts to link his speech to the broader issue of patient care in order to invoke the mantle of public concern. The "white paper," however, basically is a justification of Wilson's administrative decisions and personnel assignments.

The form of the speech is a memo to Wilson's superior, Dr. Hamilton. Like the speech in *Cliff*, the comments are addressed solely to an internal audience. There is no indication of an intent to bring a problem to the public's attention.

The context in which Wilson wrote the "white paper" reinforced the conclusion that Wilson was dealing with an issue that affected his position at the Hospital, and only indirectly with the general welfare of hospital patients. Wilson wrote his "white paper" after Hospital administration responded to Williams's complaint about her work assignment and her suggestion that she was a victim of gender discrimination. As Wilson himself stated, the administration's response threatened to undermine his role and responsibility.

Evidence as to Wilson's intent in writing the "white paper" comes from its content, form, and context. The above analysis of those three factors suggests that Wilson was seeking to rectify workplace problems related to the discharge of his duties. The "white paper" contains his personal opinion as to the most desirable way to organize the pharmacy department. In summary, we see no significant difference between Wilson's speech and that of the plaintiffs in the foregoing cases. Thus, we conclude that the "white paper" raises issues of personal, not public concern.

All of the cases that Wilson cites are factually distinguishable from the instant case.[3] In each, the plaintiff

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[3] *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979) (dismissal of teacher who publicly charged racially discriminatory policies and practices within school district); *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir.) (firing of county employee who made statements to coworkers and other accusing her supervisor of mismanagement and possible criminal conduct), *cert. denied*, 115 S. Ct. 2616 (1995); *Kincade v. City of Blue Springs*, 64 F.3d 389 (8th Cir. 1995) (dismissal of city engineer whose report to Board of Aldermen criticized engineering and construction of dam and misuse of public funds), *cert. denied*, 116 S. Ct. 1565 (1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992) (termination of probation department volunteer who criticized juvenile hall conditions to judges was terminated), *cert. denied*, 508 U. S. 908 (1993); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989) (discharge of county employee who complained of supervisor's sexual harassment and problems with alcohol); *Roth v. Veteran's Admin. of Gov't of U.S.*, 856 F.2d 1401 (9th Cir. 1988) (discharge of physician hired to correct deficiencies in alcohol abuse unit who repeatedly reported wastefulness, mismanagement, unethical conduct, violations of regulations and incompetence); *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) (termination of city inspector who cited facility for public

charged misfeasance, malfeasance or nonfeasance by a public officer. In each, the plaintiff attempted in some fashion to bring the claim to the public's attention. In each, plaintiff's speech invoked a broad public issue that only tangentially affected the plaintiff's position within the organization. And in each, a successful resolution of the plaintiff's claim would have brought the plaintiff little more than the personal satisfaction of performing a public service. Moreover, none of the plaintiffs' speech occurred in the context of an ongoing management dispute.

Here, Wilson threatened that failure to make personnel decisions in accordance with his management plan would be detrimental to the Hospital. He was not seeking to inform the public that the administration was derelict in serving Hospital patients. Rather, he was justifying his own actions and philosophy and attempting to protect his own position. Although the general topic of quality patient care is one of public import, the connection between that topic and Wilson's speech is tenuous. Accordingly, we conclude that Wilson made his comments on behalf of his own interest and the speech was not of public concern.

III
WEIGHING THE STATE'S INTEREST

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safety hazard violations and who reported his supervisors for using city employees to perform private and political campaign work); *Cox v. Dardanelle Public Sch. Dist.*, 790 F.2d 668 (8th Cir. 1986) (dismissal of teacher who spoke publicly about school policies and practices); *McKinley*, 705 F.2d 1110 (firing of police officer who publicly criticized the city's decision to not give annual raises); and *White v. State*, 78 Wn. App. 824, 898 P.2d 331 (1995) (transfer of administrative assistant who reported case of suspected patient abuse), *review granted*, 128 Wn.2d 1024 (1996).

Even were we to assume the speech had some public concern value, the Constitution would not afford Wilson protection unless that value was greater than the Hospital's interest in fulfilling its mission. *Connick*, 461 U.S. at 147-8. This also is a question of law for the trial court to determine. *Rankin*, 483 U.S. at 386; *Binkley*, 114 Wn.2d at 382. Again, we review the issue de novo. *Connick*, 461 U.S. at 151 n.10.

The extent to which the employer must justify its competing interest is reduced by the magnitude of the employee's speech. *Binkley*, 114 Wn.2d at 383. Where the employee's speech is only tangentially of public concern, the employer's burden is lighter. *Binkley*, 114 Wn.2d at 383. The time, manner, place, and context of the employee's speech are also relevant factors in the analysis. *Rankin*, 483 U.S. at 388.

Here, the Hospital's interest in having its employees efficiently and properly fulfill the Hospital's legal function clearly outweighs the slight public concern value of Wilson's speech. *Pickering*, 391 U.S. 563. The Hospital has a duty to resolve employee grievances and to maintain a discrimination-free work place. RCW 49.60.180(2), (3). It also has an interest in avoiding disruption and assuring compliance with management decision. *Connick*, 461 U.S. at 151; *Binkley*, 114 Wn.2d at 385; *Rankin*, 483 U.S. at 388. A public employer needs wide discretion and control over the management of its operation. *Connick*, 461 U.S. at 151. These interests were frustrated by Wilson's refusal to comply with his supervisor's requests.

Upon reviewing the facts and circumstances in context, it is clear that the Hospital's management decisions were appropriate in light of its mission. After Williams complained of unequal treatment, the Hospital had a duty to investigate and respond. RCW 49.60.180(2), (3). Ultimately, the Hospital administrators had the authority and responsibility to resolve this personnel dispute and to

assure compliance with their directives. Wilson's recalcitrance could have seriously impaired the Hospital's ability to maintain a harmonious and discrimination-free work place.

In sum, the degree of public concern related to Wilson's speech was slight while the Hospital's interest in effective management and in not violating another employee's employment rights was significant. Constitutional protection for Wilson's speech would hinder management's ability to carry out is responsibilities. Thus, we conclude that the Hospital's legitimate interests outweighed any free speech interest that Wilson had in his "white paper" comments, and that Wilson's speech was not entitled to constitutional protection. Accordingly, Wilson's First Amendment claim fails as a matter of law.

IV
QUALIFIED IMMUNITY

Additionally, defendants claim that the doctrine of qualified immunity shields them from liability. Wilson asserts that the defendants waived this affirmative defense by their failure to plead it.

Qualified immunity is immunity from suit, not immunity from liability. *Alvarado v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988). Its purpose is to protect the individual government employee from the inhibiting effect that the fear of personal liability might create. *Savage v. State*, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995). It does not apply to the State when, as here, the State is sued in its respondeat superior capacity. *Savage*, 127 Wn.2d at 436. Thus, the trial court did not err in denying the State's motion for a judgment notwithstanding the verdict on this ground.

We engage in a different analysis when we consider the applicability of the doctrine to the individual

defendants. First, we note that a defendant may raise the defense at any stage of the litigation, including by posttrial motion. *Krause v. Bennett*, 887 F.2d 362, 368 (2d Cir. 1989); *Alvarado*, 859 F.2d at 45[illegible].3. As the defendants here raised the issue at the close of their case and again in a memorandum supporting their motion for judgment notwithstanding the verdict, they did not waive the issue.

Public officials are immune from suit unless the "law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). This means that the doctrine is not applicable to defendants if, by their conduct, they violated a clearly established constitutional right of which a reasonable person would have been aware. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) *aff'd.*, 922 F.2d 443 (8th Cir. 1990).

The applicability of qualified immunity to a particular individual is a question of law. *White v. State*, 78 Wn. App. 824, 837, 898 P.2d 331 (1995), *review granted*, 128 Wn.2d 1024 (1996). A plaintiff seeking to rebut a defendant's claim of qualified immunity must demonstrate that the defendant's conduct interfered with a clearly established constitutional right. *White*, 78 Wn. App. at 837. "Clearly established" means that the contours of the right were so obvious at the time the official acted that a reasonable official would have understood that what he was doing violated that right. *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) (citing *Anderson*, 483 U.S. at 640). Thus, the plaintiff "must do more 'than identify a clearly established legal test and then allege that the defendant has violated it. The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.'" *Altshuler v. City of Seattle*, 63 Wn. App. 389, 395, 819 P.2d 393 (1991) (quoting *Hannula v. City of Lakewood*, 907 F.2d

129, 131 (10th Cir. 1990)), *review denied*, 118 Wn.2d 1023 (1992)

An employee has a clearly established right to speak on an issue of public interest. *Brawner*, 855 F.2d at 192-93. And case law protects a public employee's speech that reveals the improper conduct of coworkers. *Brawner*, 855 F.2d at 193. But the record in this case does not support the conclusion that Wilson's speech fits within these categories.

First, as we discussed in section II, Wilson's comments about the pharmacy's administrative structure do not qualify as speech of public concern. Second, a reasonable hospital administrator/manager dealing with Wilson's refusal to follow administrative directives would not have understood that he or she was violating Wilson's free speech rights by reassigning him to another position of equal pay within the organization. To the contrary, a prohibition against the removal of a non-responsive manager would be unreasonable and could easily lead to organizational chaos. Thus, Wilson has failed to show that defendants interfered with his "clearly established" constitutional free speech rights. Consequently, the individual defendants may claim the defense of qualified immunity.

V
CIVIL CONSPIRACY

To establish a civil conspiracy, Wilson must prove by clear, cogent and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967). Mere suspicion or commonality of interests is insufficient

to prove a conspiracy. *Corbit*, 70 Wn.2d at 529.

Wilson conceded that the removal of his working title and reassignment was not unlawful. It follows then that he seeks to prove the conspiracy by the second prong -- that his removal and transfer was accomplished by unlawful means. To support this, he offers, as the illegal acts, Watson's secretive taping of their meeting, Watson's alleged theft of his computer disk, and defamation.

A. Secret Taping and Theft of Computer Disk

Viewing the evidence in a light most favorable to Wilson, and recognizing that Watson's taping and computer disk appropriation may have been illegal, there is no evidence that anyone other than Watson was involved in these acts. Thus, these acts cannot support the conspiracy theory.

B. Defamation

To show defamation, Wilson alleges that Williams said he was "out to get the technicians." Without more, this is not defamatory. Moreover, according to the record, Williams never made this statement; another individual did.

C. Technicians' Grievance Against Wilson

Finally, we discuss whether evidence of the technicians' grievance against Wilson supports his conspiracy claim. Wilson did not specifically cite this to support the claim either in his appellate brief or in oral argument. He did, however, include comment about this incident in his discussion of the facts. Assuming that Wilson intended this comment as argument, we find the argument lacks merit.

As we stated above, a plaintiff seeking to prove

technicians about their grievance, acted unlawfully. Williams testified that any information she provided to the technicians was necessary to the discharge of their duties. Two other pharmacy technicians testified that the technicians decided to file the grievance because they failed to obtain a satisfactory resolution of identified concerns and that filing a grievance was the "next step." Wilson's mere suspicions will not support his conspiracy theory.

As we find no evidence of any illegal act by two or more individuals, the civil conspiracy claims also fails.

We vacate the judgment and remand with instructions to dismiss the action.

/s/ Seinfeld, C.J.

We concur:

/s/ Bridgewater, J.
/s/ Morgan, J.

APPENDIX B

42 U.S.C. § 2000E-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Revised Code of Washington 49.60.180(3)

49.60.180 Unfair practices of employer. It is an unfair practice for any employer:

. . .

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any

sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person: PROVIDED, That is shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

APPENDIX C

DATE: October 23, 1989

TO: Jack Wilson, Pharm.D.

FROM: Katy Williams, Pharm.D.

SUBJECT: Decrease in dispensing time for D. Watson, Pharm.D.

As director of this department, it has been your policy that pharmacists with advanced training (doctorate degrees and residencies) spend an equal amount of time dispensing medication as pharmacists with bachelor degrees. It is this policy that has cost our department one (possibly two) clinical pharmacists. If you will recall, Dr. Shaner left one year ago because of the amount of time he was forced to spend dispensing medications and the lack of time for clinical functions. More recently, Dr. Watson has threatened to resign for the same reason.

Our department clearly needs more time devoted to clinical pharmacy services. Our current consultation service is deplorable. Most consults take several weeks to complete.We have some consults that are several months old and have not yet been completed. Frustrated physicians are beginning to declare that their consults are emergencies, in order to get the answers they need in a more timely manner. I know of no other discipline in the hospital where consults are not completed for weeks or months.

I have worked under your policy of dispensing the same number of hours as the bachelor degree pharmacists for

more than two years now. During this time I have proven my skills as a clinician within our department and with the physicians that I have worked with through my clinical consults and rounding services. Although I have voiced my concern about not utilizing my clinical education in the best interest of the patients to you several times, you have been completely unwilling to decrease the amount of time that I spend dispensing medications. I have recently learned that you have altered your policy for Dr. Watson, a newly hired pharmacist with the same education and job classification as myself. With a sincere regard for the patients here, I insist that I receive the same decrease in dispensing that Dr. Watson has received, to allow me to accomplish more clinical tasks. Also, as a clinical pharmacist, I demand to be treated in an equal and fair fashion.

If you are unwilling or unable to respond to this staffing issue in writing by Wednesday November 8, 1989 at 6:00 PM, I shall be forced to take my concerns to your supervisor, Dr. Hamilton.

cc:: D. Hamilton, M.D.

APPENDIX D (1)

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
9601 Steilacoom Blvd. S.W.
P.O. Box 94500, W27-19
Ft. Steilacoom, Washington 98494-0500
(206) 582-8900

November 21, 1989

TO: R.D. Hamilton, M.D.
Director, Professional Services

FROM: Katy Williams, Pharm.D.
Clinical Pharmacist

SUBJECT: Meeting follow-up

I wanted to thank you for taking time to meet with me and discuss my concerns about the amount of time that I am currently required to dispense medications, and the lack of time for clinical functions.

I look forward to hearing from you next week after you discuss this issue with the Pharmacy Director.

Thank you.

APPENDIX D (2)

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
9601 Steilacoom Blvd. S.W.
P.O. Box 94500, W27-19
Ft. Steilacoom, Washington 98494-0500
(206) 582-8900

November 9, 1989

TO: R.D. Hamilton, M.D.
Director, Professional Services

FROM: Katy Williams, Pharm.D.
Clinical Pharmacist

SUBJECT: Memo to J. Wilson, Pharm.D.

Enclosed is a memo that I sent to Jack Wilson, Director of Pharmacy, regarding the dispensing time for Clinical Pharmacists. I met with him to discuss this issue on November 8, but we could not reach an agreement.

I would like to schedule a meeting with you to discuss this matter. Your secretary can contact me at ext. 2691.

Thank you.

cc: J.R. Reynolds
OEO Office

APPENDIX E

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
9601 Steilacoom Blvd. S.W.
P.O. Box 94500, W27-19
Ft. Steilacoom, Washington 98494-0500
(206) 582-8900

December 12, 1989

TO: R.D. Hamilton, M.D.
Director, Professional Services

FROM: Katy Williams, Pharm.D.
Clinical Pharmacist

SUBJECT: Meeting follow-up

As you will recall, on 11/21/89 I met with you to discuss the amount of time that clinical pharmacists are required to spend dispensing medications. I indicated to you that I felt that Dr. Wilson had unfairly denied a decrease in my dispensing time, while doing so for a newly hired clinical pharmacist. You told me that you would discuss this with Dr. Wilson. As of today, I have received no word regarding this issue. I wish to inform you that unless I receive notice of a solution that I consider acceptable by 12/15/89, I will have no recourse but to take this matter to your supervisor.

Thank you.

cc: OEO Office

[Handwritten]

12/14/89

TO: Ms. Williams

FROM: R.D. Hamilton

Have discussed problem with Jack Wilson, who indicated to me that he will balance dispensing time among clinical pharmacists.

cc: Jack Wilson

APPENDIX F

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
9601 Steilacoom Blvd. S.W.
P.O. Box 94500, W27-19
Ft. Steilacoom, Washington 98494-0500
(206) 582-8900

14 December 1989

TO: Jack Wilson, Pharm.D.
Director, Pharmacy

FROM: R.D. Hamilton, M.D.
Director, Professional Services

SUBJECT: Complaint by Katy Williams, Pharm.D.

As we discussed late last month, Ms. Williams has a legitimate complaint regarding the disproportionate time she spends in dispensing versus that of the newly hired clinical pharmacist.

As you will recall, I told you that it was my opinion that Ms. Williams had every right to file a discrimination complaint over this issue and that if she did I would rule in her favor.

I asked you to meet with the Clinical Pharmacists and work out an acceptable, equal dispensing system for them. I noted that I did not want to override your decision in the Pharmacy, i.e., that is poor management.

Please see the attached letter to me from Ms. Williams and my handwritten note back to her. I still do not wish to make decisions about management in the Pharmacy, since I believe that would undermine your supervisor authority. However, I will do so if you do not. Ms. Williams' argument is legitimate.

I trust you will take immediate steps to correct this situation.

RDH

APPENDIX G

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
9601 Steilacoom Blvd. S.W.
P.O. Box 94500, W27-19
Ft. Steilacoom, Washington 98494-0500
(206) 382-8900

29 December 1989

TO: Jack Wilson, Pharm.D.
Director, Pharmacy

FROM: R.D. Hamilton, M.D.
Director, Professional Services

SUBJECT: Attached Memo from Katy Williams to the Superintendent

You leave me no choice but to give you the following directive:

> You are to immediately balance the dispensing time for Katy Williams, so that she will not exceed the dispensing time of the other Pharm.D.

RDH

APPENDIX H

DATE: January 3, 1990

TO: R.D. Hamilton, M.D., Director
Professional Services

FROM: J.R. Wilson, Pharm.D., Director
Department of Pharmaceutical Services

SUBJECT: RESPONSE TO DR. KATHLEEN WILLIAMS CONCERNS

SUMMARY

Dr. Kathleen Williams feels that: (a) she is being unfairly asked to contribute 4 to 5 more hours per week toward dispensing than Dr. Watson (another staff in the Clinical Pharmacist job class), (b) I do not have the authority to direct her to perform job description tasks in proportions different from other staff in the same job description, and (c) our credentialling system is faulty because it allows any pharmacist, regardless of formal degrees and post-graduate training, to advance into more clinical responsibilities based solely on measured performance which cannot satisfactorily measure intangible skills achieved through formal, university-based training.

I have responded that: (a) Dr. Watson's rare and certified post-graduate credentials in psychopharmacy indisputably qualify him for specialist level responsibilities and considerations with regard to daily work routine, (b) I have full authority and responsibility via Merit System Rules to assign job description tasks in different proportions to persons in identical job descriptions as I determine

necessary to best meet patient and department needs, and (c) despite known imperfections related to intangibles measurement, our credentialling system was adapted using nationally respected methods and principles which are conceptually sound and which create an incontrovertibly fair and "incentivized" work environment that properly rewards actual performance.

I received Dr. Williams' November 1989 memo and discussed her concerns at length with her, with Dr. Smith, Associate Pharmacy Director, and Mr. Aikin, Personnel Manager. Detailed findings, assessment and recommendations appear below.

BACKGROUND INFORMATION

Because Dr. Williams' concerns challenge the underlying philosophy, core principles and direction chosen in 1985 for our department, it is necessary to review/understand some background information before a rational response to her concerns can be presented.

1. **Current Status Of Hospital Pharmacy Practice w/ Regard To Dispensing By Clinical Pharmacists w/ PharmD Degrees - U.S. vs the State of Washington.**

   U.S. Colleges of Pharmacy are involved in a major transition to eliminate BS degrees and offer only PharmD degrees by the year 2000. The current census of 8,500 hospital PharmDs (an average of 170/state) and the graduation rate in the U.S. indicates that the number of U.S. PharmDs may equal/exceed the current 1990 total number of hospital pharmacists between years 1995 and 2000. By these future dates, the vast majority of PharmDs

will be involved in some dispensing activities. During this transition period, PharmD use varies widely in the U.S., depending on PharmD availability and utilization/transition philosophies. The State of Washington is far behind other states in both numbers of hospital-based PharmDs (perhaps several dozen only) and in the rate of PharmDs graduated (approx 10/year). However, at least one of this state's two universities has announced it will graduate only PharmDs beginning in the next few years. The point is that there is a national and local transition occurring which, in the workplace, can result in role and responsibility confusion and debate.

2. **WSH Pharmacy Department Philosophy & Credentialling System.**

During this U.S. transition toward clinically trained pharmacists, the WSH pharmacy management team has adopted a progressive performance-based (NOT degree-based) philosophy concerning pharmacist utilization. The philosophy is highly regarded on both national and local levels. The philosophy drives the core credentialling system now evolving. In the credentialling system, pharmacists will be assigned one of three different work titles based on measured competence (i.e., volume and quality factors). The outcome/ performance-based system will help create a "degree-blind", "even playing field" for all pharmacists. The first credentialling is due in February based on early outcome measurements, but the

system is dynamic and is expected to evolve considerably over the next few years. Reasons for developing and maintaining our department's philosophical positions regarding merit-based staff use include: (a) desire to avoid any elitist perceptions about degrees which are considered divisive and counterproductive in a team oriented department, (b) desire to create an "even playing field" for all staff based on objective performance criteria, (c) maintain a substantial incentive for all staff to achieve and maintain recognized high levels of competence, (d) prepare a fair structure and progressive philosophy under which WSH can recruit for scarce pharmacist personnel during the pharmacy profession's transition to a clinical model; this would avoid a destructive reputation in the applicant pool for degree-versus merit-based staff advancement.

3. **PharmD vs BS Level Staff Assignments Since 1986.**

Whenever possible since 1985 and prior to developing our credentialling system, we have assigned staff to areas and tasks best matching their known strengths and interests. Dr. Williams, with her general medicine training and as a pediatric specialist without psychopharmacotherapy expertise, was assigned to East Campus where she could give service to CSTC and utilize her general medicine background on E-7. At her hiring and since, we have emphasized our desire to train her in clinical psychopharmacology so that she would be able to better serve our clientele in whom 80 percent of therapy involves psychotropics. On initial testings, she scored below our BS level staff who had

undergone an intensive, 18 month psycho-pharmacology training program developed in our own department. However, we expected her (and still do) to ultimately surpass our BS staff due to her applied clinical training and acumen which we believed would only require learning the psychopharmacology database. We still believe this to be true and expect that on the next round of examinations (February 1990) she will prove to be a leader. She has been given several special clinical assignments because of her general clinical medicine background, but has not yet been recognized for her presumed competence in psychopharmacology, nor has she been given special assignments chiefly involving psycho-pharmacotherapy. Other PharmDs without psychopharmacotherapeutics training have been similarly assigned, including drug distribution responsibilities.

4. **WSH Pharmacy Department Recruitment & Hiring History.**

In 1986, WSH could not wait for a comprehensive and philosophically sound (hospital/secondary-tertiary level) pharmacy job descriptions package to be developed. Medicare accreditation and JCAHO certification was paramount. Therefore, we used all means which were available to recruit staff for the development and implementation of a long term strategic plan consistent with national hospital pharmacy standards which would ultimately lead to an effective and nationally prominent program. Without an adequate job package with which to structure and develop needed programs, the WSH pharmacy had to temporarily rely on "patchwork/makeshift" recruitment, organization and staffing assignments based on less objective management methods. Despite offering the lowest

pharmacist salaries in the state of Washington, WSH has attracted an unusually high caliber staff with advanced/specialty training and who are recognized locally and nationally. Ironically and simultaneous to our recruitment successes, WSH had extreme difficulty attracting needed traditional hospital pharmacists for whom a progressive/supportive work environment proved inadequate.

5. **Philosophical Concerns Expressed By Dr. Williams Over The Last 18 Months & Prior To Her 11/89 Memo.**

   On several brief occasions, Dr. Williams has approached me and my associate director with concerns about our department's philosophy to utilize PharmD and BS level staff in a similar fashion with regard to some aspects of both dispensing and clinical services. Dr. Williams believes PharmD staff should be doing more clinical and less distributive work, while BS staff should perform more distributive and less clinical work. While we respect her opinions, we have uniformly stood by competency/outcome measures rather than degree-based assignments for reasons cited in #2 above, and, thus, we developed our credentialling system. We believe that the credentialling system will, in the long run, ultimately surpass the outcome of degree-based assignments because of resulting increased productivity for all staff in this more "incentivized" environment. This position is also consistent with management literature and with ASHP direction.

6. **Philosophical Controversies Among Pharmacy Staff About WSH Program Development & Transition Of Pharmacy Profession.**

WSH pharmacist staff, comprised of about half BS and half PharmD level persons, are often divided on the controversial issues of BS vs PharmD utilization. The controversy has been frequently and openly expressed in the literature over the last 20 years and is by no means unique to the WSH department of pharmacy which is only a "microcosm" of national debate. Because of this and our commitment to team orientation, the "middle ground" philosophy of outcome and performance-based advancement makes even more sense.

7. **WSH Pharmacy - History, Current Reputation & Future.**

WSH is involved in a comprehensive, multi-year reorganization and restructuring of its pharmacy services, involving everything from basic philosophies to practical outworkings of function and procedure. While the process is incomplete and significant weaknesses still exist, the WSH pharmacy has experienced substantial success. WSH is now regarded by peers as one of the nation's leading psychiatric hospital pharmacy departments. However, our national leadership does not come from where we are today, but rather, from where we are going, how we are getting there, the rate of current progress and the level of administration support. All WSH pharmacists are proud of the recognition received as a department, but virtually no WSH pharmacist is satisfied with or proud of the current state of operations. The department still has a long way to go.

ASSESSMENT

After reviewing all of Dr. Williams' concerns and background information above, I must come to the following conclusions:

1. Dr. Williams has misstated her situation to you regarding my decision toward Dr. Watson relative to her situation. Dr. Williams' concerns are actually primarily philosophical in nature, reflecting her difference of opinion with management concerning use of persons with advanced training.

2. With regard to job descriptions and task assignment, management is obligated to assign work based on needs and perceived staff skills. There is no requirement, nor should there ever be, to ensure that persons in similar job descriptions perform precisely the same, proportioned volume of similar tasks. RCWs (Merit System Rules) only require management to ensure that an employee fulfills job description tasks at least 51 percent of the time. This RCW requirement should be met regarding Dr. Williams' work assignments.

3. The hiring and task assignments of Dr. Watson were well justified and consistent with July 1989 WSH credentialling by-laws, national practice standards and management principles. Also, concurrent to his application, WSH had no pharmacist applicants, a burgeoning dispensing workload, a grossly inadequate job descriptions series for pharmacists and a grossly inadequate salary structure. Even with Dr. Watson's rare credentials in psychiatry, which opened many other opportunities and higher salaries for jobs w/ 100%

clinical work and no dispensing duties, he chose to come to WSH at a 25 percent dispensing ceiling, which our pharmacy management team agreed to. His rare credentials (2 year post-doctorate Clinical Science Fellowship in psychopharmacy) and custom-fit competencies in psychiatry were well known and certified at his hiring. I believed then, and still do, that to not hire Dr. Watson under these circumstances would have been irresponsible and a serious disservice to patient care, WSH healthcare professionals, and WSH administration.

4. The current WSH pharmacy department philosophy is progressive, sound and even-handed regarding pharmacist task assignment and is reflected in the developing pharmacist credentialling system found in WSH 1989 by-laws. The underlying philosophy in WSH by-laws/credentialling has created an incontrovertibly fair and even playing field for all pharmacists regarding work assignments which should enhance department morale, incentives and productivity.

5. Any decisions involving special task assignments of Dr. Williams or any pharmacy staff must be consistent with the pharmacy department's fundamental 1985 competency-based philosophy. To now abandon a competency-based philosophy for a degree-based philosophy would have severe repercussions since it would:

    a. be contrary to local and national standards;
    b. be contrary to competency-based 1989 WSH by-laws;
    c. demonstrate inconsistency on the part of management which has

emphasized and established

competency as the singlemost important criteria for special task assignment;

d. lead to potential resignations and/or grievances from several BS staff who are already on record as opposing any such inconsistencies as subjective, unfair partiality/ favoritism, elitist and grounds for discrimination; and

e. require the department to expeditiously develop a new philosophy in its place and modify or abolish numerous other procedures/practices since the current philosophy is pervasive throughout the department's operations.

6. The WSH Department of Pharmaceutical Services is in the midst of a five year reorganization and restructuring toward national standards (Medicare, JCAHO & ASHP standards). During this entire period, many key distributive and clinical deficiencies have been openly and repeatedly acknowledged by all members of the pharmacy department management team and nearly all other WSH pharmacists. A number of Dr. Williams' concerns are shared by myself and other pharmacy management staff but should be considered a natural part of the department's growth and evolution away

from the previous substandard community-based practice model and toward a progressive hospital model. A considerable degree of patience by everyone is necessary during this period.

7. Dr. Williams feels that she is being unfairly asked to contribute 4 to 5 more hours a week toward dispensing than another Clinical Pharmacist, Dr. Watson. She also believes she is spending 50 percent or more of her time in dispensing activities compared to all other pharmacists (BS and PharmD) who report between 30 to 35 percent. All pharmacists are required to perform Rx verification of technician work only. However, contrary to policy, during her dispensing rotations, Dr. Williams is known to consistently spend more time than any other WSH pharmacists in actual dispensing activities, beyond the required Rx verification. No WSH pharmacists have been asked to do this. In fact, all WSH pharmacists have been asked explicitly to not perform dispensing task other than Rx verification. One exception to this is during short staff/heavy workload periods and this is authorized only after it is determined that NO technicians on other pharmacy teams are available (i.e. all techs busy on Rx processing in their own units or have completed their shifts, etc.).

8. To honor Dr. Williams' request to reduce her dispensing time by 4-5 hours/week at this time, without first objectively certifying her competencies through our credentialling system, would require our department to abandon its competency-based philosophy for a weaker degree-based philosophy which could have serious adverse impact on staff morale and invite serious grievances about

inconsistencies, discrimination and other related inequities.

9. If Dr. Williams' request was implemented as stated, a dangerous precedent would be set that would (a) state that all staff with or without additional types of formal training who are in similar job descriptions must be given equally proportioned tasks regardless of individual variations in strengths and weaknesses perceived by management; this undermines the manager role and responsibility; (b) be unsupported by RCWs, national practice standards, management theory/practice, etc., and (c) seriously undermine the credentialling process of all WSH staff (MDs, nurses, psychologists, etc.) since credentialling, by definition, leads to differences in proportioned task assignments within identical job descriptions.

10. From all appearances, Dr. Williams is performing well as a Clinical Pharmacist. However, her psychiatric competencies are not yet certified. She scored below BS pharmacists 18 months ago on a comprehensive examination which confirmed beliefs of BS pharmacists that she was perhaps less capable in the psychiatry specialty than they were. However, management was convinced that Dr. Williams' lack of baseline knowledge was temporary and that her clinical training, her drive and her commitment to learning psychopharmacology would ultimately lead to her surpassing the competencies of BS pharmacists not so inclined and not formally trained. Management believed that her certified clinical acumen in general medicine/pediatrics only required cultivating clinical psychopharmacology knowledge for her to become a proficient WSH clinical practitioner. Although all pharmacists were asked to consider retaking the

previous psychopharmacology examination to establish their mastery of basic psychopharmacology topics, Dr. Williams did not elect to do so. However, with all WSH pharmacists, she will soon have her second chance to demonstrate her baseline knowledge objectively in February of 1990.

11. **Dr. Williams' Specific Written And Verbal Concerns.** In her memo and in discussions with her, Dr. Williams stated her chief concern about a perceived descriminatory management decision to assign a 25 percent dispensing limit to Dr. Watson. Her specific concerns with my response to each appear below:

Page 5 (continued)
Dr. Hamilton re: KW Concerns: 1-3-90

a) **Task Assignment To Staff In Identical Job Descriptions.** Dr. Williams feels that management should ensure that all staff in identical job descriptions are assigned equal proportions of dispensing tasks.

Mngt Response: see #2 assessment above.

b) **Education/Training vs Dispensing Time.** Dr. Williams feels her education/training is equivalent to the new staff member who was assigned a 25 percent maximum limit in Rx dispensing; therefore, she feels that she should be similarly assigned.

Mngt Response: Dr. Watson has extremely rare credentials as a psychopharmacy specialist. To attract him to WSH, we agreed to some conditions of employment felt to be in the best interest of patient care and departmental growth. Also see #2

assessment above.

c) **Inaccurate WSH Rx Dispensing Data.** Dr. Williams feels that WSH pharmacists are inaccurately reporting Rx dispensing time at 30 to 35 percent; She feels pharmacist dispensing time actually exceeds 50 percent, including her own time.

Mngt Response: see #7 assessment above.

d) **WSH Clinical Pharmacy Credibility.** Dr. Williams feels that our current inability to keep up with clinical consult demands is eroding our credibility among physicians who wait too long for consult responses. She feels that our department should invest more time in clinical services.

Mngt Response: I agree with Dr. Williams. However, with low staffing and recruitment problems, other areas are also in substandard conditions (e.g drug distribution accuracy). In these circumstances, more patience is required by all as we progress/improve.

e) **Increase Clinical Productivity By Freeing Up PharmD Staff For More Clinical Work And Assigning BS Level Pharmacists More Distribution Duties.** Dr. Williams feels we could increase productivity by freeing up PharmD staff to more efficiently perform clinical services. Furthermore, she felt that important patient care needs are not being met. She felt that the policy of having both BS and PharmD level pharmacists spend equal amounts of time in dispensing is a disservice to patients since this compromises both

efficiency and quality of pharmaceutical care delivery.

Mngt Response: see # 2 & 5 assessments above.

f) **Nationally Sound Philosophy Of Practice:** Dr. Williams feels that the current department policy concerning PharmD utilization is out of step with current practice and is contributing to staff losses. She noted that our present policy has cost us one clinical pharmacist so far and could invite other resignations if left unchanged.

Mngt Response: Our present policy did not cause the loss of a Clinical Pharmacist. The Clinical Pharmacist (Dr. Shaner) who left did so because a rare 100 percent clinical position opened up in DSHS. Dr. Williams erroneously implies that he would have stayed if his dispensing duties could have been reduced from 15 to 10 hours/week. This is not so. In fact and underscoring the seriousness of background item #6, the ONLY staff member who left with concern over this issue was a BS level staff who felt strongly that BS level staff should be treated more equally to PharmD staff regarding their work assignments.

g) **Demonstrated Competencies.** Dr. Williams feels that she has proven her skills as a clinician and has earned the right to perform less distributive and more clinical services.

Mngt Response: Management suspects but is not able to certify this to be so. However, Dr. Williams will have an opportunity to demonstrate a portion of her competency in February (see #2 above).

RECOMMENDATIONS: Based on all above

considerations, I request your support for my doing the following immediately:

1. Except in emergency conditions, immediately direct Dr. Williams to discontinue all dispensing activities

beyond Rx verification. This should result in her performing dispensing tasks 30 to 35 percent of the time, the amount of time she has been previously assigned, and is expected, to do.

2. Do not reassign dispensing task percentages to Dr. Williams or any other pharmacists until after the initiation of new assignments following credentialling implementation in February 1990.

3. Resolve the issue concerning true clinical vs distributive workload proportions for Dr. Williams and all WSH pharmacists by immediately implementing a pharmacist workload measuring system; make sure the system is consistent with the USCF-developed PCU (Patient Care Unit) system now in use for measuring distribution activity. Use January 1990 results from this system in concert with the credentialling system to redirect clinical and distributive tasks of Dr. Williams' and all other WSH pharmacists while ensuring consistency with job descriptions and competency-based philosophies.

4. Re-emphasize to Dr. Williams that she can establish her credentials through the credentialling system beginning next month.

5. Request Dr. Williams to consider playing a more active role in the development of the credentialling program as it appears to be an important concern and interest of hers.

6. If the situation remains unresolved, request a formal review and opinion on the matter from UW or WSU Chairman of Pharmacy Practice and/or ASHP. Such consultations can be obtained at relatively low cost.

cc T. Aikin, Personnel Officer
file